No. 89-1063-CFX
Status: GRANTED

Title: FirsTier Mortgage Company, aka Realbanc, Inc., Petitioner
v.
Investors Mortgage Insurance Company

Docketed:
December 26, 1989

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Dawson,Jack S.

Counsel for respondent: Gray,Eric S., Roberts,John P.

40 printed copies mailed 12/26 and recd. 12/28. Affid. of mlg. on file. NOTE: 90th day was Christmas.

Entry	Date	Note	Proceedings and Orders
1	Dec 26 1989	G	Petition for writ of certiorari filed.
2	Jan 25 1990		Brief of respondent Investors Mortgage Insurance Company in opposition filed.
3	Jan 31 1990		DISTRIBUTED. February 16, 1990
6	Feb 20 1990		REDISTRIBUTED. February 23, 1990
7	Feb 26 1990		Petition GRANTED.
			**********
8	Apr 12 1990		Joint appendix filed.
9	Apr 12 1990		Brief of petitioner FirsTier Mortgage Company, aka Realbanc, Inc. filed.
10	May 17 1990		Brief of respondent Investors Mortgage Insurance Co. filed.
11	Jun 13 1990		Reply brief of petitioner FirsTier Mortgage Company, aka Realbanc, Inc. filed.
12	Jul 2 1990		CIRCULATED.
13	Jul 23 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 10, 1990. (4TH CASE)
14	Sep 20 1990		Record filed.
		*	Certified copy of original record and proceedings received.
15	Oct 10 1990		ARGUED.

89-1063

Supreme Court, U.S.
FILED
DEC 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court's announcement of its decision granting Defendant's Motion for Summary Judgment, thereby disposing of Plaintiff's entire case, but reserving the right to enter judgment and findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2).

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order, absent prejudice to appellees.

TABLE OF CONTENTS

	Page(s)
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
A. Trial Court Announced A Final Decision From The Bench On January 26, 1989	6
B. Findings Of Fact And Conclusions Of Law Not Jurisdictional Requirement	8
C. Notice Of Appeal Should Have Been Deemed Filed On March 3, 1989	8
CONCLUSION	12
APPENDICES	
Appendix A - Order from Court of Appeals dated September 26, 1989	A-1
Appendix B - Letter from Court of Appeals dated April 5, 1989	B-1
Appendix C - Transcript of hearing before the Honorable Luther L. Bohanon, United States District Judge, dated January 26, 1989	C-1
Appendix D - Order from United States District Court for the Western District of Oklahoma, filed March 3, 1989	D-1
Appendix E - Memorandum Opinion of Luther L. Bohanon, United States District Judge, filed March 3, 1989	E-1
Appendix F - United States District Court docket sheet	F-1

TABLE OF AUTHORITIES

Cases:	Page(s)
Acosta v. Louisiana Department of Health and Human Resources, 652 F.2d 20 (9th Cir. 1981) *cert den.* 456 U.S. 943	9
Bankers Trust Co. v. Mallis, 98 S.Ct. 1117 (1978)	5
Catlin v. United States, 324 U.S. 229 (1945)	7
Dowling v. City of Philadelphia, 855 F.2d 136 (3rd Cir. 1988)	6
Featherstone v. Barash, 345 F.2d 246 (10th Cir. 1965)	6, 8
Federal Savings & Loan Insurance Corporation v. Huff, 851 F.2d 316 (10th Cir. 1988)	7, 10
First National Bank of Fort Smith, Arkansas v. Mattingly, 312 F.2d 603 (10th Cir. 1962)	6, 8
Gillespie v. U.S. Steel Corporation, 379 U.S. 148 (1964)	7
Kasishke v. Baker, 144 F.2d 384 (10th Cir. 1944)	7
Lewis v. B.F. Goodrich Company, 850 F.2d 641 (10th Cir. 1988)	10, 11
Milliner v. Government of the Virgin Islands, 593 F.2d 532 (3rd Cir. 1979)	8
Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas, 753 F.2d 857 (10th Cir. 1985)	7
Sacks v. Rothberg, 845 F.2d 1098, (D.C. Cir. 1988)	6
Sooner Products Company v. McBride, 708 F.2d 510 (10th Cir. 1983)	7

Cases:	Page(s)
United States Of America v. Green, 847 F.2d 622 (10th Cir. 1988)	9, 10
United States of America v. Moore, 616 F.2d 1030 (7th Cir. 1980), *cert. den.*, 446 U.S. 987	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1-2) is not reported. The opinion of the district court is reported at 708 F.Supp. 1224 (W.D. Okla. 1989).

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1-2) was entered on September 26, 1989. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. Title 28 U.S.C.S. §1291 provides:
   Final decisions of district courts

   The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from

all final decisions of the district courts of the United States, the United States District Court or the District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§1292(c) and (d) and 1295 of this title.

2. Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2) provides:

> Appeal as of Right - When Taken
> (a) Appeals in Civil Cases.
>
> . . . .
>
> (2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

STATEMENT

FirsTier Mortgage Company, a/k/a Realbanc, Inc. ("FirsTier")[1] sued Investors Mortgage Insurance Company ("IMI") for bad faith refusal to honor eight private mortgage insurance policies and for punitive damages. IMI moved for summary judgment. On January 26, 1989, the trial court heard arguments on Defendant's Motion for Summary Judgment. The court announced its finding that all of the subject insurance policies

[1] FirsTier Mortgage Company's parent companies and subsidiaries are: FirsTier Financial, Inc.; FirsTier Bank, N.A., Omaha; FirsTier Bank, N.A., Lincoln; FirsTier Data Services, Inc.; FirsTier Leasing Co.; LeaseBanc Financial Corp.; FirsTier Services, Inc.; Asset Recovery Co.; DeLay First National Bank & Trust Co. of Norfolk; and FirsTier Brokerage Co.

were void for fraud, and that Plaintiff's claim for punitive damages was moot. The court thereby disposed of Plaintiff's entire complaint.

We obtained a transcript of the court's decision as announced from the bench at that hearing. (App. C.) The court said, *inter alia:*

> I find that the policies *should be and are cancelled* as void for want of [sic] fraud, bad faith. The *Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.*
>
> Of course, in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.
>
> The Court does find that they relied on the package in each of these loans and that the package was not honest. In fact, it was dishonest. The dishonesty should and does void the policy.
>
> Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court will then modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about. (App. C, 15.)
>
> . . . .
>
> MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

> MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it. I don't agree that it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the court to do that.
>
> THE COURT: *That will be the ruling.* (App. C., 16-17, emphasis supplied.)

It is clear to us from a reading of the transcript and a review of the record below that the court and counsel for both parties treated the judge's announcement from the bench as a final decision.[2] The only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law.

On March 3, 1989, the trial court entered its Order and Judgment and Memorandum Opinion, with findings of fact and conclusions of law. The Order and Judgment rendered judgment in favor of the Defendant and against the Plaintiff. (App. D, E.) A copy of the docket sheet reflecting the entry of the trial court's Order and Judgment and Memorandum Opinion is attached hereto (App. F.).

Pursuant to F.R.A.P. 4(a)(2), FirsTier filed its Notice of Appeal on February 8, 1989. No tolling motions as described in F.R.A.P. 4(a)(4) were filed. FirsTier's Notice of Appeal should have been treated as if it had been filed immediately after the court entered its order memorializing its decision on March 3, 1989.

[2] On February 10, 1989, IMI filed its Bill of Costs and Application for Attorney's Fees. IMI repeatedly characterized itself as the prevailing party and as having achieved a complete and total victory on summary judgment. FirsTier objected to same. IMI never raised the issue of the possible prematurity of FirsTier's appeal. The court of appeals raised this issue *sua sponte*.

On April 10, 1989, counsel for FirsTier received the court of appeals' letter dated April 5, 1989 directing counsel to brief the jurisdictional issues described therein (App. B.).[3]

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered its order dismissing Appeal No. 89-6042 for lack of jurisdiction. The court of appeals found that the oral announcement by the district court on January 26, 1989, was not a final decision within the meaning of 28 U.S.C. §1291 (App. A.).

REASONS FOR GRANTING THE PETITION

1. The court of appeals has decided a question of federal law which has not been, but should be, settled by this Court. This Court should decide whether the announcement of a decision from the bench which disposes of all claims as to all parties, reserving the right to enter findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of F.R.A.P. 4(a)(2).

2. The court of appeals' decision is in tension with this Court's decision in *Bankers Trust Co. v. Mallis*, 98 S.Ct. 1117 (1978). In *Mallis*, this Court said that Federal Rule of Civil Procedure ("F.R.C.P.") Rule 58's requirement of a separate

[3] Pursuant to F.R.A.P. 4(a)(5), on April 14, 1989, counsel for FirsTier filed its Application for Extension of Time to File Notice of Appeal from the trial court's March 3, 1989 Entry of Judgment. We believed that the court announced a final decision from the bench on January 26, 1989. However, if our understanding of the court's intent was in error, the error was excusable. The trial court agreed and granted FirsTier an extension of time until May 1, 1989 in which to appeal from the court's order entered on March 3, 1989. FirsTier filed its Notice of Appeal from the March 3, 1989 Order on April 25, 1989, resulting in 10th Circuit Appeal No. 89-6145. IMI appealed from the trial court's F.R.A.P. 4(a)(5) grant of an extension of time in which to appeal, resulting in Appeal No. 89-6150.

document could not have been intended to be such a categorical imperative that the parties are not free to waive it. In this case, the parties treated the trial court's announcement of its decision as a final decision. The parties waived the separate document requirement.

3. The court of appeals' decision is in conflict with decisions of other circuits. *See*, e.g., *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988) (Court of appeals has power to take premature appeal where prematurity was cured shortly after filing notice of appeal by subsequently entered order. The Third Circuit noted the division in the courts of appeal on this issue in *Dowling, supra*, f.n. 2, p. 138). *Sacks v. Rothberg*, 845 F.2d 1098 (D.C. Cir. 1988) (Premature notice of appeal vests court of appeals with jurisdiction once district court disposes, finally, of all matters pending before it, citing case law in accord from Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits).

4. The path chosen by the court of appeals would, in essence, render Federal Rule F.R.A.P. 4(a)(2) a nullity. After the trial court announced its decision to cancel all of the insurance policies, the only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law. Findings of fact and conclusions of law are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash*, 345 F.2d 246 (10th Cir. 1965); *First National Bank of Fort Smith, Arkansas v. Mattingly*, 312 F.2d 603 (10th Cir. 1962).

A. Trial Court Announced A Final Decision From the Bench On January 26, 1989. FirsTier's

complaint sought enforcement of eight policies of private mortgage guaranty insurance plus punitive damages for IMI's bad faith refusal to honor the insurance policies. On January 26, 1989, the trial court announced its decision that all of the policies should be and are cancelled as void. Then the trial court said that FirsTier's claim for punitive damages was moot. The court's bench announcement extinguished FirsTier's entire complaint. The court's decision disposed of all of the issues as to all of the parties in the case and was, therefore, an announcement of a final decision. *Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Sooner Products Company v. McBride*, 708 F.2d 510 (10th Cir. 1983); *Kasishke v. Baker*, 144 F.2d 384 (10th Cir. 1944). It has long been the rule that: "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229 (1945).

In *Federal Savings & Loan Insurance Corporation v. Huff*, 851 F.2d 316 (10th Cir. 1988), the Tenth Circuit Court of Appeals recognized the "theme of practicality" expressed by the Supreme Court in *Gillespie v. U.S. Steel Corporation*, 379 U.S. 148 (1964):

> "[O]ur cases long have recognized that whether a ruling is 'final' within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this court

has held that the requirement of finality is to be given a 'practical rather than a technical construction.' "

As a practical matter, FirsTier's lawsuit against IMI was over when the court announced that the policies "should be and are cancelled . . .". The court's decision was final and the court of appeals should have exercised jurisdiction over Appeal No. 89-6042 pursuant to F.R.A.P. 4(a)(2).

B. Findings Of Fact And Conclusions Of Law Not Jurisdictional Requirement. After the court announced its decision to cancel all of the insurance policies, the only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law. Findings of fact and conclusions of law are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash, supra; First National Bank of Fort Smith, Arkansas v. Mattingly, supra.*

The trial court's oral findings and conclusions announced at the end of the January 26, 1989 hearing were sufficient to indicate the basis of the trial judge's decision. Even in the absence of a formal judgment, the oral findings would have provided an adequate basis for appellate review. *Milliner v. Government of the Virgin Islands,* 593 F.2d 532 (3rd Cir. 1979).

C. Notice Of Appeal Should Have Been Deemed Filed On March 3, 1989. Federal Rule of Appellate Procedure (F.R.A.P.) 4(a)(2) provides: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry

and on the day thereof." FirsTier filed its Notice of Appeal from the trial court's announcement of its decision on February 8, 1989. The trial court entered its Order and Judgment on March 3, 1989. There were no motions which would cause FirsTier's Notice of Appeal to "self destruct" pursuant to F.R.A.P. 4(a)(4). Pursuant to F.R.A.P. 4(a)(2), FirsTier's Notice of Appeal ripened on March 3, 1989, immediately after the court entered its Order and Judgment memorializing its bench announcement. *Acosta v. Louisiana Department of Health and Human Resources,* 652 F.2d 20 (9th Cir. 1981).

The Tenth Circuit recently considered F.R.A.P. 4(b) under circumstances virtually identical to this case. *United States of America v. Green,* 847 F.2d 622 (10th Cir. 1988). F.R.A.P. 4(b) provides that, in criminal cases, a "notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." The quoted language from F.R.A.P. 4(b) is virtually identical to the savings clause contained in F.R.A.P. 4(a)(2).

In *Green,* the criminal defendant moved for dismissal of an indictment. On October 18, 1985, the court denied his motion. On the same day, the defendant entered and the court accepted a conditional plea of guilty. Ten days later, the defendant filed his notice of appeal. Finally, on December 5, 1985, the court sentenced the defendant and entered its order of judgment.

The Tenth Circuit Court found that the saving provision in F.R.A.P. 4(b) allowed the defendant's notice of appeal to ripen after the court's judgment was finalized and entered. In reaching this

conclusion, the court cited *United States v. Moore*, 616 F.2d 1030 (7th Cir. 1980), *cert. den.*, 446 U.S. 987, a case in which the Seventh Circuit assessed the impact of the 1979 amendments adding the savings provisions to F.R.A.P. 4(a). The court in *Moore* said, *inter alia*, that the purpose of establishing a savings provision for premature notices of civil appeals was to "extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely." Advisory Committee on Appellate Rules, 1979 Amendment, Note to Subdivision 4(a)(2).

The *Green* case is one of three recent cases from the Tenth Circuit in which the court adopted a "forgiving attitude" toward premature notices of appeal. *Federal Savings & Loan Insurance Corporation v. Huff, supra; Lewis v. B.F. Goodrich Company*, 850 F.2d 641 (10th Cir. 1988).

Both *FSLIC v. Huff* and *Lewis v. B.F. Goodrich* involved cases which, unlike this one, involved multiple claims, part of which were not adjudicated when the notice of appeal was filed. However, before the circuit dismissed the appeal, the district court had adjudicated all remaining outstanding claims. The court found that F.R.A.P. 4(a)(2) permits the interpretation that the notice of appeal, filed prematurely, ripens and saves the appeal when all of the claims are finally adjudicated. And in *Lewis*, the court adopted the following approach:

> "When the district court case is still ongoing at the time the appeal reaches this court's attention, two possibilities arise. One is that a belated Rule 54(b) certification has been obtained. In this situation, if the appellant obtains a 54(b) certification after the notice of appeal was filed, we will deem the notice of appeal to ripen as of the date of certification and will accept the jurisdiction pursuant to the savings provisions of Fed.R.App.P. 4(a)(2). The other possibility is that no Fed.R.Civ.P. 54(b) certification has been obtained. For this, we hereby adopt the practice of notifying the parties of our observation of the apparent jurisdictional defect and giving them a date certain by which to secure Rule 54(b) certification or an order or judgment explicitly adjudicating all remaining claims. If no certification, or final, dispositive adjudication, is obtained and presented to this appellate court by the specified date, the case will be dismissed summarily for lack of appellate jurisdiction."

In this case, the trial court has disposed of all remaining claims by written judgments which have been entered on the docket. On March 3, 1988, the trial court entered its Order and Memorandum Opinion with findings of fact and conclusions of law sustaining Defendant's Motion For Summary Judgment and disposing of Plaintiff's entire Complaint. On April 6, 1989, the trial court entered its written order granting Defendant attorneys' fees.[4] The trial court has made a final, dispositive adjudication of all claims in the case. The court of appeals' decision is inconsistent with that of other circuits (*see* p. 6, *supra*). In fact, the court of appeals' decision is inconsistent with its own recently adopted approach to F.R.A.P. 4(a)(2). Even when the oral decision fails to dispose of all

[4] On April 12, 1989, FirsTier filed a Notice of Appeal from the trial court's order awarding defendant its attorneys' fees, resulting in Tenth Circuit Appeal No. 89-6128.

issues as to all parties in the case, the courts of appeals have held that the premature notice of appeal ripens when a final order disposing of all issues is subsequently entered.

The trial court announced its decision to dispose of FirsTier's entire complaint on January 26, 1989. The trial court's announcement was a final decision within the meaning of 28 U.S.C. §1291. On March 3, 1989, the trial court memorialized its decision in an Order and Judgment, with findings of fact and conclusions of law in a Memorandum Opinion. Pursuant to F.R.A.P. 4(a)(2), FirsTier's Notice of Appeal should have been deemed to be filed on March 3, 1989. The court of appeals should have accepted jurisdiction pursuant to the savings provision of F.R.A.P. 4(a)(2).

CONCLUSION

FirsTier's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FILED
September 26, 1989
United States Court of Appeals
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-6042
No. 89-6145

FIRSTIER MORTGAGE COMPANY, a/k/a REALBANC, INC.,
Plaintiff-Appellant,

v.

INVESTORS MORTGAGE INSURANCE COMPANY,
Defendant-Appellee.

ORDER

Before MOORE, BALDOCK and EBEL, Circuit Judges.

This matter comes on for consideration of an Order of the Court challenging appellate jurisdiction in 89-6042, the memorandum briefs of the parties in response thereto, the motion to dismiss filed in 89-6145 by Appellee-Defendant Investors Mortgage Insurance Company, the response in opposition thereto by Appellant-Plaintiff Firstier Mortgage Company, and the preliminary record on appeal.

Upon consideration whereof, it is ordered as follows:

1. 89-6042 is dismissed for lack of jurisdiction. The oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291.

2. The motion to dismiss filed in 89-6145 is denied. The issue of excusable neglect raised by Defendant will be addressed by the panel assigned 89-6150 on the merits.

3. The opening brief on the merits in 89-6145 shall be served and filed by Appellant-Plaintiff within 40 days of the date of this Order. Subsequent briefing shall proceed in accordance with 10th Cir. R. 31.2.1. SEE 10th Cir. R. 10.2.

Entered for the Court
ROBERT L. HOECKER, Clerk

By:
THERESA SMITH
Deputy Clerk

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294
Robert L. Hoecker, Clerk

April 5, 1989

TO: ALL COUNSEL

RE: 89-6042, FirsTier Mortgage Company, etc. v. Investors Mortgage Insurance Company

Dear Counsel:

The Court is considering summary dismissal of this appeal for lack of jurisdiction.

Within twenty-one (21) days of the date of this letter, the parties simultaneously shall serve and file memorandum briefs, in quadruplicate, in support of their respective positions on the jurisdictional issue(s) identified below. The memoranda shall contain citation to relevant legal authorities and proof of service on all parties. SEE 10th Cir. R. 27.2.2.

These memoranda shall address only the jurisdictional issue(s) set forth below. The issues on appeal are not to be discussed. The briefing schedule for the issues on appeal is *tolled* until further order of the Court. SEE 10th Cir. R. 27.2.3.

Very truly yours,

ROBERT L. HOECKER, CLERK

/s/
Kathleen T. Clifford
Deputy Clerk - Appeals Expediter

JURISDICTIONAL ISSUE(S):

1. Whether the February 8, 1989 Notice of Appeal was filed prematurely? SEE Fed. R. App. P. 4(a)(1).

2. Whether the decision orally rendered by the Court at the January 26, 1989 Hearing was final in light of the fact *that* the Court requested Defendant to submit suggested finding of fact and conclusions of law, *that* the Court then allowed Plaintiff a specified period of time to respond to the suggested findings and conclusions, and *that* the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law? *See* district court docket sheet entry No.148; 28 U.S.C. §1291.

Counsel-of-Record:

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Eric S. Gray, John P. Roberts, Roberts, Gray, Goresen & Moriarty, 101 N. Robinson, Suite 1340, Oklahoma City, OK 73102

For Information:

Robert D. Dennis, Clerk, U.S. District Court for the Western District of Oklahoma Room 3210, U.S. Courthouse, Oklahoma City, OK 73102 (D. Ct. #CIV-87-564-B)

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. CIV-87-564
Oklahoma City, Oklahoma
January 26, 1989

FIRSTIER MORTGAGE COMPANY,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LUTHER L. BOHANON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JACK DAWSON and JANICE DANSBY Attorneys at Law Colcord Building Oklahoma City, OK
For the Defendant:	ERIC GRAY and GREG PILCHER Attorneys at Law 2900 First Oklahoma Tower Oklahoma City, OK
Court Reporter:	Lynn L. Hilton 3011-C U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: The Court has for consideration this morning the case of Firstier Mortgage versus Investors Mortgage Insurance Company.

Jack Dawson, you represent the Plaintiff?

MR. DAWSON: Yes, Your Honor.

THE COURT: Mr. Roberts?

MR. GRAY: Mr. Roberts is not here today, Your Honor. Eric Gray and Greg Pilcher here on behalf of Investors.

THE COURT: Do you have a motion?

MR. GRAY: Yes, Your Honor, it is my Motion for Summary Judgment.

THE COURT: Do you want to be heard on it?

MR. GRAY: Yes.

THE COURT: I might say that the file in this case has become very voluminous. The parties have filed and refiled and filed and refiled papers and mortgages and I have read everything. I can't say that I understand everything perfectly, but I think I understand the problem is whether or not the insurance issued by Investors Mortgage Insurance Company is insurance that carries liability or whether it does not. Is that the question?

MR. GRAY: Yes, basically, Your Honor, whether my client is liable under the policies or is exonerated from those policies based on an Oklahoma Statute under Title 36, Section 3609.

THE COURT: Was there eight policies issued?

MR. GRAY: Yes, eight policies.

THE COURT: All right. The Court will hear you on it.

MR. GRAY: I realize that there is a mountain of briefs in this case, Your Honor, but in essence it is a very simple case. Plaintiff is in the business of making loans; Defendant is in the business of insuring losses on default on those types of loans.

The premium on insurance of this type is based on the risk insured, obviously. In the present case, there were eight mortgage loans that were made on duplex properties in Elk City, Oklahoma.

All of the properties were owned by the same man, a man by the name of Bill Tucker. Mr. Tucker sought to sell those properties. He found buyers. It is our contention that they were all straw buyers. It is admitted, by the Plaintiff at least, that five of them were what I call straw buyers. They didn't have any money of their own invested in the property.

There is some dispute over three of those properties, but I will address that in just a moment.

In connection with each of the mortgage loans, the Plaintiff sought insurance from my client, Investors Mortgage Insurance Company. My client reviewed the documentation that was submitted to them, which is set forth in the briefs herein, but essentially it is the loan application, all of the documents that go into making a loan.

Based upon those documents, my client issued commitment/policy to the Plaintiff on each of the loans. Those commitment/policies are in Exhibit B in my original Motion for Summary Judgment.

IMI, my client, thought they were insuring loans where the sales price was $94,000, where the appraised value was $94,000 and where the loan amount was 80 percent of the value of the property or approximately $75,200. That's what they thought.

In reality, that was not true. The truth was that there was no money involved in these transactions other than the loan amounts and the true loan to value ratio was 100 percent, because in essence the properties were being sold for the loan amounts.

These borrowers, there are six total borrowers, had no money of their own at stake, they made no down payment, they had no earnest money on deposit with any realtor.

The risk to my client when the loan changes from an 80 percent loan to 100 percent loan increases astronomically.

The relevant statutory framework that we need to look at, and the Court has previously granted partial summary judgment in this matter with respect to the applicability of Section 3609 of Title 36 of the Oklahoma Statutes.

That statute basically provides that once the Court finds that a misrepresentation, omission, concealment of fact or incorrect statement has been made, there is a second-prong to the test and that is in order to avoid liability under the policy, you must satisfy one of three elements; either the misrepresentation, incorrect statement, concealment of fact or omission must be fraudulent or must be material to the acceptance of the risk or the hazard assumed or the insurer in good faith would not have issued the policy had the true facts been known.

It has been contended by the Plaintiff that they were innocent in this transaction, that they had no knowledge that these borrowers weren't really making the down payments.

The statute provides that the representations made by or in behalf of the insured are sufficient to void the policy if they meet the terms of the statute.

The borrowers were making statements on behalf of Firstier, there's no question about that from the documents that are submitted to you. The affidavit of purchaser and vendor which had to be submitted at the time the policies were issued specifically says that to induce the mortgage insurer to insure these loans, you are representing that these facts are true. Well, they weren't true.

Even aside from that, the policies of insurance on their face state that there is to be a loan to value ratio of 80 percent. That was not true in this case.

The question becomes whether the loan to value ratio is material to the risk or in good faith IMI, my client, would not have issued these policies. We don't have to show that Firstier, the Plaintiff in this matter, knew about the fraud that was being perpetrated by these borrowers and by the seller.

If the Legislature had intended for knowledge to be a prerequisite, they would have left it with one alternative — fraudulent. But they didn't do that, they left it in the disjunctive. It can be fraudulent or it can be material to the risk or in good faith the insurer wouldn't have issued the policy. Any one of those three will void the policy.

There are some cases that are nearly directly on point. Particularly one, *United Guaranty v. Pioneer*, which is cited in the briefs in this matter. It is out of the Southern District of Florida. Essentially in that case the borrowers had misrepresented their income. But Florida had at that time an identical statute with the Oklahoma statute and the Florida Court gave judgment for the insurer.

In terms of meeting the materiality test, there is a case out of the Ninth Circuit, a 1987 case, *Verex v. John Hanson*. That case basically describes mortgage guaranty insurance. In paraphrasing it, it basically says there's very few things more material to mortgage insurance than the loan to value ratio. It measures the risk of the insured.

The most recent case interpreting Section 3609 under Oklahoma law is a case called *Coptin v. Shelter Insurance*. It is an Oklahoma Court of Appeals case. That case dealt with a situation where there was a theft loss and the insured had failed to disclose to the

insurer that its property had previously had a fire loss several years prior or that the property was for sale at the time of obtaining the insurance.

The Court of Appeals in reversing a jury verdict for the insured basically interpreted Section 3609 and held that even innocent misrepresentations would be sufficient to void a policy of insurance under Section 3609.

I had told the Court that I would come back to those three policies where there is some dispute. The policies where there is some dispute were taken out by a man by the name of Charles Wolfus and a couple by the name of Park and Glenda Largent. The Largents bought two of these properties and Mr. Wolfus purportedly bought one.

Each of these persons has testified under oath that they — well, Mr. Largent and Mrs. Largent testified they assumed they made the down payments, but they didn't know, didn't remember. Mr. Wolfus testified without a doubt he took a cashier's check to the closing payable to American First Abstract Company.

I think that the record will reflect that these statements are absolutely false. The Largents, based upon their financial position at the time and the source of their down payment, could not have possibly purchased two of these properties.

The Largents' source of down payment or settlement monies for one of the properties was to be from the sale of some other property that they had.

That property was shown as being sold on a settlement statement, but two days later the property was deeded back to the Largents and they therefore had no funds from the sale of that property to make the down payments in this case. Their other liquid funds were simply not sufficient.

Mr. Wolfus as well says that he gave a cashier's check to American First Abstract. Well, we subpoe-

naed the records of Mr. Bill Tucker, the seller in this case, from his bank. The bank records show eight checks written on Mr. Tucker's personal account; some of them, particularly in the case of the Largents', with the notation "Largents" at the bottom of them, in the exact amounts needed to close the loans at American First.

The truth is Mr. Tucker made the down payments. It was a wash to him. He put the money in, he got the money back, because he was the seller. The checks are written on the exact days of closing. Not all eight loans closed on the same day, they were over a period of time. But each check was written on the exact day that closing was to occur on one of the loans. It was written in the exact amount of the amount necessary, down to the penny, the amount necessary to pay under the settlement statement. They were all payable to American First Abstract in cash by American First Abstract.

There has been briefing in this case on the issue of the knowledge of the agent, American First, being imputed to Plaintiff Firstier.

I can address that if the Court wishes, but we do not contend or believe that the issue of Firstier's knowledge is in any way necessarily relevant. We have met the terms of the statute otherwise, but even if knowledge is relevant, we believe that the knowledge of that agent, American First Abstract in taking those eight checks from the seller, having no buyer with any money there giving it a check to American First should be imputed to Firstier since American First could do nothing but act for Firstier at that closing. It was an escrow agent. It took the money of Firstier, it took the instructions of Firstier as to how to disburse that money and when to disburse it and took on the responsibility of seeing that all of the documents were properly filed and executed.

There is one additional matter and that is there are two causes of action by Firstier in this matter. The first cause of action is on the eight loans. The second is a bad faith claim.

We would ask that if the Court grants summary judgment, that the Court grant summary judgment on the bad faith claim as well. My client cannot be in bad faith if the underlying policies are void. Thank you.

THE COURT: Mr. Dawson.

MR. DAWSON: If it please the Court, we have not addressed these bad faith issues in any of the briefs at all. We could, I suppose, file another mountain of briefs on that if necessary, but I don't think so. I won't speak to that issue.

These two parties before this Court were at one time, and we say still are, risk partners. Those are words that were chosen by the insurance company. They told us, "We are going to be your risk partners." They chose those words.

Both of us are going to take a risk on the reliability of borrowers, people who are going to borrow money from my client. My client is going to loan 100 percent of the money. We are going to, in addition, pay them some premium and they are going to help us out to the extent of 20 percent of our loss if the buyers aren't reliable. So we are really out there.

What we do — there is no application — what we do is every bit of the documentation that we have gathered in order to make our decision as to whether to loan these people money, we take all of those documents and give them to the insurance company for their review.

We have the affidavit in this case, we filed it, of Mack Martin who worked for the company at that time. He says, I'll paraphrase and quote part, "I and my underwriters independently decide whether to insure

the lender." They make their own decision based upon these documents. They are required to examine all documentation furnished by lender and make their own independent determination to quote, "Share the risk." The reason he puts that in quotes is because that's the insurance company's language, "Share the risk".

Now we made no misrepresentation to IMI. We made no representation at all. What the insurance company wants to say is that the false statements of these borrowers who we both are worried about, they were false. Well, those statements weren't made on behalf of the lender. They were made to the lender to make us do something, make us loan 100 percent of the money.

The affidavit that opposing counsel talks about is an affidavit prepared by the insurance company and the borrowers make those statements directly to the insurance company. They are not made on my behalf, on behalf of Firstier Insurance Company, nothing is.

We have the Brunson case which we have cited in our brief, *Brunson v. Midwestern Life Insurance Company*. It says that a misrepresentation in insurance is a statement which the insured — that would be Firstier — which the insured states with the knowledge that it is untrue and with an intent to deceive. That's what they are going to have to prove my client did; that we knew a statement we made was wrong and we meant to deceive them or they can prove that we made a statement positively without knowing whether it was true or not.

If they can prove either one of those things, then we have made a misrepresentation under this 1976 case from the Oklahoma Supreme Court.

No statement that we made was untrue at all. Particularly we made no statement that we knew anything was positively true. What we say is, what they

have us to say and the only representation we make at this time back in 1982 was that the statements made in the affidavit, the affidavit being made by the lender, to the best of our knowledge — and that's the words which IMI carved out for us to say, "To the best of our knowledge, those statements are true and correct."

That is true. At that point those statements were true and correct to the best of the knowledge of Firstier or they wouldn't be loaning 100 percent, they wouldn't be loaning 90 or $80,000 or whatever it is.

That's the way it was. That's all they asked us to tell them at that time. To the best of our knowledge, these statements are true. There's not a scintilla of evidence that Firstier had any idea that anything was going on at the time it was going on.

Now in 1984, after this, the insurance company changed and if — this is the point — if we had signed-on in '84, then we wouldn't be here today. There would be no case at all, there would be none, because later, before we made our claim but after we got our insurance policy, they changed. Then we would have to agree that the warranties — I'm quoting — "The warranties, representations and statements made herein and the documents, forms and other written matter submitted in the process of obtaining this commitment, whether made by the insured, the borrower or any of the parties shall be deemed warranties, representations and statements of the insured and which shall be deemed material for purposes . . ." and so forth.

After 1984, lenders had to agree that any statement made by the borrower was their statement. But before 1984, they didn't make that. That is the pivotol point on this case. Are the statements made by the borrowers our statements? No. Are they made on our behalf? No. They were made to us and they were made directly to IMI, but not by us or on our behalf.

This case is like the fellow who has a house and he wants to insure it against termites. He tells the insur-

ance company, "I don't think I have termites. You come look at my house." They go look at the house and it turns up they don't think he does and they issue the policy but later they determine all the time he had termites.

Or a health insurance policy where the man says, "I think I'm in good health" and later it is determined that he had some kind of disease or something.

There is a case just like that. It is the Whitlack case, a Oklahoma case, 1968, *Whitlack v. John Hancock*. This fellow knew that he had shortness of breath and chest pain, knew that he had high blood pressure, but he made an application saying he was in sound health. He later died two months after he got the insurance policy of a coronary thrombosis.

The trial Court ruled against the widow. But the Supreme Court said, "No, because the rule" — I'm quoting — "The rule consistently applied by this Court in a multitude of decisions is that the question of falsity of statements in an application for life insurance and the applicant's intent in making such statements are questions for determination by the jury."

Whether the applicant intended to deceive is a question for determination by the jury, says the Whitlack case. That was a health and accident or life insurance case like I was talking about.

IMI told us all the time that after we make our review, our independent review of these documents and after we issue this policy, we are going to come around and spot-check. If we find that we have been deceived, do you know what we are going to do? Nothing. We are not going to cancel this policy if we find out the borrower or the appraiser has deceived you and us. That's in their manual.

Their policy is different now, but back when we came on board with them, their policy — and we have supplied this with our materials — says that "Negative

review findings in no way affect the validity of the commitment or policy of insurance which has been issued."

If they review these loans and find bad acts, that's just a service that they will prepare for us. Frequent and significant variations will cause IMI to contact the lender to determine the cause of the discrepancies and try to help identify the problem and so forth.

On appraisals, on spot-checking these appraisals, after the policy is issued, if they think something is wrong, they will engage a qualified, independent appraiser to prepare a report on fair market value of the property and if they find chronic problems with individual fee appraisers, it will share that knowledge with lenders as a part of IMI's risk partnership with the lender.

In other words, they say we are going to spot-check all of these loans. If we find out the appraisers are phony or if we find out the borrowers are crooked, we are going to tell the lender. We are going to share that knowledge with you as a part of our risk partnership with you. We are not going to cancel the policy because of it, because they couldn't at that time. That wasn't their policy then. They have got new owners and they have got new policies now.

The affidavit of Mack Martin who worked for them at the time, the vice president in this region, said that he knew of no policy that had ever been canceled because of these reviews after the policies were issued. It had never happened before. Well, that changed. But it changed after this policy was issued, Your Honor.

That's the important part of this lawsuit. Again I'll tell you, admit, that if we had taken out these policies in 1984 after the policies changed, we wouldn't be here. This lawsuit wouldn't have been filed. We couldn't have filed it. Before then we could have. It was a different contract we had.

Counsel talked a little bit at the end about the agent, American First. In this case we have filed, when they brought up that issue late in the case, we got an affidavit and went down to American First, went through the situation with them and we have an American First affidavit that's filed in the case.

American First says, We are not the agent of Firstier here. We are a stakeholder and that's all we are. We have no knowledge of anything that was done wrong anyway. We don't have any knowledge that anything was done wrong. Our files are perfectly in order. We don't have any knowledge.

I don't see the relevance of even bringing up the closer in this case under the facts in this case.

Thank you, Your Honor.

THE COURT: Yes.

MR. GRAY: Brief rebuttal, Your Honor.

Counsel discussed the contract between the parties. The contract between the parties is contained in the commitment policy. Briefly I would like to tell or read to the Court what that contract says.

It says, "In consideration of the premium paid by the insured lender and the representations made by the insured lender below and in the application submitted, Investors Mortgage Insurance Company agrees to pay insured lender subject to the terms and conditions of this policy any loss sustained by reason of the default by the borrower in payments upon the loan identified as follows." Then they identify the loan.

The loan is identified as having a sales price of $94,000 and an appraised value of $94,000, a loan to value ratio of 80 percent.

At the bottom of the contract between the parties, it states, "Representations: The insured lender hereby represents that the loan transaction designated above has been closed, the loan is not in default.

Any special conditions set forth herein have been satisfied by the buyer/seller affidavit that we made reference to previously and other necessary documents have been forwarded to the company and that the appropriate premium has been paid."

That's the contract between the parties. These representations are the representations of Firstier. But even if they are not, they are the representations made by borrowers on behalf of Firstier.

It was stated that there's not a scintilla of evidence that Firstier knew. Obviously Investors Mortgage Insurance disputes that fact.

I won't dwell on this, Your Honor, but the loan officer who took the applications for these loans was the same individual. Some of the borrowers testified that they never personally met with him even though the loan applications state on their face that they were taken by face-to-face interview.

The loans that are the subject of the litigation today were not ever subject to that spot-check review. It is completely irrelevant. But even if it is somehow thought to be relevant, it is tantamount to saying that it's okay to defraud us. That would never be said by any insurance company and certainly wasn't the intent of Investors Mortgage Insurance in this case.

It was also stated previously that intent is always a question for the jury. Now I totally agree with that. But I also would show the Court that intent is not an issue in this case. The intent of Firstier in obtaining these mortgage insurance policies is not an issue. The issue before the Court is the interpretation of Section 3609 and its applicability to these facts.

Thank you, Your Honor.

THE COURT: Does counsel have anything further to say?

MR. DAWSON: I think we probably both have a lot more to say, but I think it would be repetitive. I don't have anything further.

THE COURT: As I said earlier, I have read and reread the pleadings, read and reread the exhibits and I have come to the conclusion that the insurance company relied on the package in making these various policies to guarantee the payment of the buyer of the property.

There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay these properties.

I find no justification for dropping the appraised value from $94,000 down to where they did.

I find that the policies should be and are cancelled as void for want of fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.

Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.

The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and does void the policy.

Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.

How much time do you want to submit this to the Court?

MR. GRAY: Would ten days be inappropriate, Your Honor?

THE COURT: That would be all right. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to to make the deal. I think that's the only reason it was done.

Is there anything else to come before the Court?

MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

Is it the Court's ruling — I'm not arguing with the Court at all — that that was a bad faith of Firstier or dishonesty in the mind of Firstier?

THE COURT: Well, it would be the bad faith of Firstier.

MR. DAWSON: Okay.

THE COURT: And the bad faith of the borrower, both of them. They worked together.

MR. DAWSON: Thank you, Your Honor, for that clarification.

MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it.

I don't agree it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.

THE COURT: That will be the ruling.

Court is in recess.

CERTIFICATION

I, Lynn Hilton, Official Court Reporter, do hereby certify that the foregoing 24 pages constitutes a true and complete transcription of my shorthand notes as taken by me on the date set forth herein.

Dated this the 12th day of February, 1989.

/s/ _____

Lynn Hilton, CSR, RPR/CP

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

ORDER AND JUDGMENT

Consistent with the Memorandum Opinion entered herein this day,

IT IS ORDERED that the following policies issued by Investors Mortgage Insurance Co. to Firstier Mortgage Co. are void and, as such, are unenforceable:

Policy No.

456987
456988
457066
457078
457225
457246
457247
457224

Further, IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of the defendant and against the plaintiff.

Dated this 3rd day of March, 1989.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

Entered in Judgement Docket on 3-3-89

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

MEMORANDUM OPINION

This matter is before the court on the Defendant, Investors Mortgage Insurance Co.'s ("IMI"), Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.

The plaintiff, Firstier Mortgage Co., a/k/a Realbanc, Inc. ("Firstier"), commenced this suit against the alleged bad faith failure of IMI to pay Firstier's claims on eight policies of private mortgage insurance underwritten by IMI. IMI defends by arguing that under Okla. Stat. tit. 36, § 3609 the policies are void because of misrepresentations, omissions, concealments of facts, and incorrect statements made by or in behalf of Firstier in the applications and negotiations for the insurance policies. IMI claims that such misrepresentations, omissions, concealments of facts, and incorrect statements were fraudulent and material to the acceptance of the risk or hazard assumed by IMI. In addition, IMI claims that if it had known the true facts, IMI in good faith would not have issued the eight policies of private mortgage insurance.

Being a drastic measure, summary judgment should be granted with caution. *Machinery Center, Inc. v. Anchor National Life Insurance Co.*, 434 F.2d 1

(10th Cir. 1970). At the same time, due regard must be given, not only to the rights of the plaintiffs to have asserted claims which are adequately based on law and in the facts to be tried by a jury, but also to the defendants' rights to show, before trial, that such claims have no factual basis. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Still the evidence and all reasonable inferences must be viewed in the light most favorable to the plaintiff. *Bruce v. Martin Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). If the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, summary judgment should be granted. *Id.* at 445. To determine if there is a need for trial, the court must pierce the pleading and evaluate the proof in the case. Fed.R.Civ.P. 56 advisory committee notes. After a motion for summary judgment, the plaintiff cannot rely on *mere conclusions* but must present sufficient evidence to establish that his claim has merit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Having read the briefs and reviewed the exhibits and the parties' submissions, and having heard the arguments of counsel, the court makes the following findings of fact and conclusions of law:

Findings of Fact

1. IMI underwrites private mortgage insurance that insures lenders against losses sustained on mortgage loans because of default by the borrowers.

2. In January, 1983, Firstier financed eight first mortgage loans on eight duplexes located in Elk City, Beckham County, Oklahoma. Firstier applied to IMI for private mortgage insurance coverage on each of the eight mortgage loans.

3. In connection with seeking private mortgage insurance from IMI to cover each of the eight mortgage loans, Firstier prepared, compiled and submitted eight insurance application packages to IMI. Each application included the following documents:

a. Loan Application of Borrower,
b. Credit Report for Borrower,
c. Verification of Borrower's income
d. Deposit Verification(s),
e. Property Appraisal,
f. Sales Contract,
g. Firstier's Summary of Loan Transaction, and
h. Affidavit of Purchaser and Vendor.

4. Subsequent to receiving the eight applications from Firstier, IMI issued a Commitment/Policy covering each of the mortgage loans. The policy number on the Commitment/Policy as well as the borrower's name and the real property purchased are as follows:

Policy Number	Name/Address
456987	Parke H. and Glenda A. Largent 107 Cripple Creek Lane Elk City, Oklahoma
456988	Parke H. and Glenda A. Largent 105 Cripple Creek Lane Elk City, Oklahoma
457066	Henry M. and Janice C. Staat 109 Cripple Creek Lane Elk City, Oklahoma
457078	Larry E. Busking 103 Cripple Creek Lane Elk City, Oklahoma
457225	Keith H. and Paula K. Busking 123 Cripple Creek Lane Elk City, Oklahoma
457246	Don W. Armstrong 125 Cripple Creek Lane Elk City, Oklahoma
457247	Don W. Armstrong 121 Cripple Creek Lane Elk City, Oklahoma

Policy Number	Name/Address
457224	Charles O. and Mary Ann Wolfes 111 Cripple Creek Lane Elk City, Oklahoma

5. Each Affidavit of Purchaser and Vendor submitted by Firstier was signed both by Firstier and by the purchaser and vendor. Each Affidavit of Purchaser and Vendor states, among other things, that the total purchase price for each property is $94,000.00, that each borrower has a cash equity equal to $18,800.00, and that the first mortgage amount is $75,200.00. In addition, each Affidavit states that the prepaid expenses involved in the loan transaction have not been paid by the vendor. Each Affidavit of Purchaser and Vendor also states that the certifications of the Affidavit are for the purpose of inducing the mortgage insurer to insure the loan.

6. Settlement statements were prepared on each of the eight loans. Each of the settlement statements was signed by the seller, the respective buyers, and by the settlement agent. Each of the settlement statements indicates that cash was paid from the borrower at the closing. However, none of the borrowers paid cash at the various closings. Instead, the seller, Bill Tucker, made the down payments for each of the borrowers resulting in no equity in the purchaser.

7. Firstier admits that Henry M. and Janice C. Staat made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 109 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $14,646.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

8. Firstier admits that Larry E. Busking made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, com-

monly referred to as 103 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrower was to pay $14,810.29 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

9. Firstier admits that Don W. Armstrong made no earnest deposit or down payment in connection with the purchase of properties in Elk City, Oklahoma, commonly referred to as 121 and 125 Cripple Creek Lane. The settlement statements prepared in connection with these loan transactions state the borrower was to pay $16,615.43 at the closing of each loan. However, these amounts were paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

10. Firstier admits that Keith H. and Paula K. Busking made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 123 Cripple Creek Lane. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $16,721.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

11. Parke H. and Glenda A. Largent made no earnest deposit or down payments in connection with the purchase of the properties in Elk City, Oklahoma, commonly referred to as 107 and 105 Cripple Creek Lane. The settlement statements prepared in connection with these loan transactions state that the borrowers were to pay $14,835.29 at each closing. However, these amounts were paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

12. Charles O. and Mary Ann Wolfes made no earnest deposit or down payment in connection with the purchase of property in Elk City, Oklahoma, commonly referred to as 111 Cripple Creek Lane. The down payment on the property was paid by Bill

Tucker, the seller. The settlement statement prepared in connection with this loan transaction states that the borrowers were to pay $14,721.52 at closing. However, this amount was paid by Bill Tucker, the seller, resulting in no equity in the purchaser.

13. The vendor and the respective borrowers executed the Affidavits of Purchaser and Vendor for the purpose of inducing IMI to underwrite private mortgage insurance covering the loans. In the Affidavits of Purchaser and Vendor, the borrowers and the vendor falsely represented the true purchase price of the properties. The borrowers and the vendor also falsely represented that the borrowers made down payments and had personal funds at risk on each of the eight loans; it is unquestionable that the purported borrowers had no cash equity in any of the properties.

14. The Affidavits of Purchaser and Vendor were submitted to IMI by Firstier for the purpose of inducing IMI to insure the subject loans. In each of the eight Affidavits of Purchaser and Vendor, Firstier represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, that the loan-to-value ratio was eighty percent (80%), and that each borrower had a cash equity in the respective properties equal to twenty percent (20%) of the purchase price. These representations were false. Because the borrowers made no down payments and had no equity in the properties, it is unquestionable that Firstier provided one hundred percent (100%) financing on each property and that the true-loan-to-value ratio was one hundred percent (100%). Loan-to-value ratio is defined in IMI's Underwriting Guidelines as the loan amount divided by the appraised value or sales price, whichever is lower.

15. Firstier signed the commitment/policies issued by IMI. Each of the eight commitment/policies expressly states that Firstier made the following representations:

> REPRESENTATIONS: The Insured Lender hereby represents that the loan transaction designated above has been closed, such loan is not in default, any special conditions set forth herein have been satisfied, that the Buyer-Seller Affidavit and other necessary documents have been forwarded to the Company, and that the appropriate premium indicated below has been paid to the Company.

The commitment/ policies issued by IMI and signed by Firstier stated that each of the loan transactions possessed the following characteristics:

1. A loan-to-value ratio equal to eighty percent (80%);
2. A selling price equal to $94,000.00; and
3. An appraised value equal to $94,000.00

It is unquestionable that these representations were false. Because the seller made the down payments for the buyers, the true sales price was $75,200.00 on each property. Further, because Firstier made loans equal to the sales price, the true loan-to-value ratio on each property was one hundred percent (100%). Finally, the evidence is convincing that the appraised value is substantially overstated given that the true selling price was only $75,200.00.

16. The settlement agent in each of the eight mortgage loan transactions was Brenda Lowery from American First Abstract Company. Firstier gave instructions to the settlement agent on a document known as a closing request transmittal rather than sending its own representative to the closings. Thus, although Firstier did not select the particular settlement agent, the settlement agent acted on Firstier's behalf and as Firstier's agent in closing the eight loans at issue in this case.

17. Pursuant to Firstier's instructions, Ms. Lowery was aware that the loan-to-value ratio could not exceed eighty percent (80%) and knew that the borrowers

did not make down payments on any of the eight mortgage loans at issue in this case. Because the cash due from the borrowers at the closing was paid by Bill Tucker, the seller, it is clear that Ms. Lowery knew that Mr. Tucker made the down payments for the borrowers.

18. IMI does not knowingly insure investor owned property mortgage loans where the loan-to-value ratio is greater than ninety percent (90%), the borrower's equity or down payment in the property is not at least ten percent (10%) of the purchase price of the property, and the sale and purchase of the property is not an arm's length transaction.

19. Under Local Rule 14, it is undisputed that IMI, in good faith, would not have issued any of the eight commitment/policies if IMI had been aware that the borrowers did not make down payments, that the borrowers had no equity in the property, that the true loan to value ratios were greater than eighty percent (80%), or that the appraised values and selling prices were substantially inflated. In short, IMI would not have issued the insurance policies at issue in this case had the true facts about each of the loan transactions been made known to IMI as required by the insurance applications.

20. The misrepresentations made in connection with the loan-to-value ratio, the borrowers' equity or loan payments in the property, and the purchases and sales of the properties were material to the acceptance of the risk assumed by IMI when it issued the insurance policies at issue in this case.

21. IMI denied Firstier's claims for loss under the eight insurance policies because of material misrepresentations, omissions, concealment of facts, and incorrect statements either made to or supplied to IMI by Firstier.

22. Although IMI independently decides whether to underwrite insurance on any given mortgage loan,

IMI's decision whether to insure a lender against loss sustained by reason of default by a borrower is based solely upon the documentation and representations submitted as part of the application for insurance. IMI did not deviate from its normal procedure in this case. IMI relied solely upon the packet of materials furnished by Firstier to IMI in determining whether to underwrite insurance on the eight loans involved in this case. The independent review that IMI conducts before issuing a commitment/policy consists only of reviewing the packet of materials furnished to IMI by the lender. IMI did not independently verify the information contained in the packet of materials furnished to IMI by the lender before issuing insurance policies on the eight loans at issue in this case.

23. Paragraph 19(a) on the reverse side of each of the eight commitment/policies renders invalid any oral statements or representations made by IMI that purport to modify the commitment/policies. Paragraph 19(a) has no relevance to misrepresentations, concealments of facts, omissions and incorrect statements made by the lender to induce IMI to underwrite insurance.

Conclusions of Law

1. The propriety of IMI's denial of Firstier's claims under the insurance policies at issue in this case is governed by Okla. Stat. tit. 36, § 3609. Section 3609 furnishes three separate grounds for an insurance company to deny coverage on an insurance policy. Specifically, Section 3609 provides:

> All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy unless:

> 1. Fraudulent; or
>
> 2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> 3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

2. The underwriting package that Firstier submitted to IMI in connection with procuring private mortgage insurance on the loans at issue in this case constitutes an "application for an insurance policy" within the meaning of Okla. Stat. tit. 36, § 3609.

3. Section 3609 specifically encompasses representations made "by or in behalf of the insured." The court agrees and specifically finds that representations made by Firstier's borrowers in documents that Firstier submitted to IMI with the insurance applications were made in behalf of Firstier for the purpose of inducing IMI to underwrite insurance and, thus, fall squarely within Section 3609 and are material "to the acceptance of the risk, or to the hazard assumed by" IMI, so as to prevent recovery on the policies.

4. The Affidavits of Purchaser and Vendor, which Firstier acknowledges submitting to IMI with the insurance application packages, were signed by the borrowers. The Affidavits of Purchaser and Vendor expressly state that they were submitted for the purpose of "inducing the mortgage insurer, if any, to insure such loan." The Affidavits of Purchaser and Vendor represent that the borrowers each had a cash equity in their respective properties in the amount of $18,800.00, that the purchase price for each property was $94,000.00, and that the first mortgage amount was

$75,200.00. However, it is undisputed that the borrowers on five of the loans insured by IMI for Firstier did not make down payments or earnest deposits. Thus, it is unquestionable that the representations made in the Affidavits of Purchaser and Vendor were false. Because these borrowers did not make down payments, they had no cash equity in the properties and the true sales price was only $75,200.00.

5. The Affidavits of Purchaser and Vendor were also signed by Firstier. Firstier represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, that the borrowers had cash equity in the properties equal to $18,800.00, and that the loan-to-value ratio was 80%. Obviously, Firstier's representations were also false. In addition, because the borrowers had no cash equity in the properties, it is clear that Firstier provided 100% financing on the properties and the true loan-to-value ratio was 100%.

6. Firstier also made misrepresentations when it signed each of the commitment/policies. Firstier expressly represented on the commitment policies that each loan had a loan-to-value ratio equal to 80%, that the selling price of each property was $94,000.00, and that the appraised value of each property was also equal to $94,000.00. These representations were obviously false given that the borrowers had no equity in the properties and that the true loan-to-value ratios were 100%.

7. The loan-to-value ratio is material to the risk assumed by IMI. As the Ninth Circuit recognized:

> LTV [loan-to-value] ratio is material because it measures risk, the touchstone of an insurance contract. As the LTV ratio increases, the risk of insuring the loan also increases even though the amount of the loan remains the same.... The risk of insuring the loan also increases even though the amount of the loan remains the same.... The risk [the insurer] was willing to accept was implicit in the commitments, stated LTV ratios.... No down payments, however, were made. The actual loan-to-scale price ratios exceeded 100%. The risk of insurance had increased, the terms of the commitment had been modified, and [the insurer] was entitled to rescind.

Verex Assurance, Inc. v. John Hanson Savings & Loan, 816 F.2d 1296, 1302 (9th Cir. 1987).

8. It is unquestionable that the borrowers fraudulently and in bad faith misrepresented in the Affidavits of Purchaser and Vendor that they had cash equity in the properties. Such fraud was perpetrated in behalf of Firstier for the purpose of inducing IMI to underwrite insurance on the loans. Thus, pursuant to Okla. Stat. tit. 36 § 3609(1), the borrowers' fraud prevents Firstier from recovering under the policies and renders the policies void as a matter of law.

9. American First Abstract was Firstier's sole representative at the eight closings and acted pursuant to instruction from Firstier. Thus, although Firstier did not specifically select American First Abstract as the particular settlement agent, American First Abstract clearly acted on Firstier's behalf and therefore was Firstier's agent. *See e.g. Hibbard v. Ford*, 55 Okla. 563, 155 P. 510, 511 (1916).

10. American First Abstract, acting as agent for Firstier at the various loan closings, knew that none of the borrowers made down payments or earnest deposits and that therefore none of the borrowers had any cash equity in the properties. It is a fundamental principal of the law of agency that the agent's knowledge is imputed to his principal. *Bailey v. Gulf Insurance Co.*, 389 F.2d 889, 891 (10th Cir. 1968); *A.A. Murphy, Inc. v. Banfield*, 363 P.2d 942, 946 (Okla. 1961); *Capps v. Whitegrass-Waterhold Flood Control and Conservency District*, 359 P.2d 318, 321 (Okla. 1961); *Bonded*

Toyalties, Inc. v. Jefferson, 174 Okla. 345, 50 P.2d 281, 283 (1935); *Allison v. Crummey*, 64 Okla. 20, 166 P. 691, 697-698 (1917). Because there is no evidence that American First Abstract was secretly acting adversely to Firstier's interest at the closings, Firstier is bound by the knowledge of its agent, American First Abstract, and is charged with the knowledge that the borrowers had no cash equity in the properties. *Bailey*, 389 F.2d at 891. Thus, it is unquestionable that Firstier submitted the insurance applications in bad faith and that such conduct constitutes fraud sufficient to void the policies under Okla. Stat. tit. 36, § 3609(1).

11. Although the court finds that Firstier and its borrowers submitted the insurance applications fraudulently and in bad faith, that finding is not necessary to this court's holding. It is not relevant whether Firstier knew that it was supplying inaccurate information with the applications so long as the misrepresentations were material to the acceptance of the risk or were relied upon by IMI in deciding to issue the insurance policies. *See* Okla. Stat. tit. 36, §§ 3609(2)-3609(3). Oklahoma courts have expressly held that Okla. Stat. tit. 36, § 3609 was designed to "provide relief from a policy the insurer was induced to issue as a result of fraudulent or *non-fraudulent* misrepresentation of material facts by the insured." *Coppin v. Shelter Mutual Insurance Co.*, 742 P.2d 594, 597 (Okla. App. 1987) (emphasis added).

12. Courts from other jurisdictions construing statutes identical to Okla. Stat. tit. 36, § 3609 have routinely held that even innocent misrepresentations will prevent recovery under the policy. In *McDonnell v. New England Mutual Life Insurance Co.*, 380 F.2d 983, 985 (5th Cir. 1967), the court of appeals upheld an award of summary judgment for the insurance company, declaring:

> There may be said to be a question of fact present as to whether the admitted misrepresentations were made falsely, with intent to deceive, or were made in good faith. But the resolution of this question was not required. Even if the incorrect statements were made in good faith, the Florida statute . . . barred recovery. In a word, this issue, if assumed to be present, was immaterial. It was not a 'genuine issue as to any material fact.' (Rule 56 F.R.Civ.P.).

See also Allstate Insurance Co. v. Winnemore, 413 F.2d 858, 862 (5th Cir. 1969); *United Guarantee Residential Insurance Corp. v. American Pioneer Savings Bank*, 655 F.Supp. 165, 168 (S.D. Fla. 1987).

13. In light of the foregoing authorities, it is clear that Okla. Stat. tit. 36, § 3609 affords relief from an insurance policy issued on the basis of material misrepresentations made in the application by or in behalf of the insured, even if such misrepresentations were made innocently and in good faith. All that Okla. Stat. tit. 36, § 3609 requires is that the misrepresentation be material to the acceptance of the risk or for the insured in good faith to prove that it would not have issued the policy with the same terms, if it had known the truth; no actual knowledge of incorrectness, untruth, or deliberate falsehood is required. *See United Guarantee Residential Insurance Corp. v. American-Pioneer Savings Bank*, 655 F.Supp at 168. Accordingly, pursuant to Okla. Stat. tit. 36, § 3609, Firstier is prevented from recovering under the policies because the documents it submitted to IMI for the purpose of inducing IMI to issue the policies contained misrepresentations that were material to the risk assumed by IMI. Indeed, it is uncontroverted that if IMI had known the true facts IMI would not have issued the policies.

14. Although Firstier has admitted only that the borrowers on five of the loans did not make earnest deposits or down payments, IMI has submitted overwhelming uncontrovertible evidence that none of the borrowers made down payments as represented in

documents submitted by Firstier as part of the insurance applications. Copies of cancelled checks made payable to the settlement agent by the seller of the properties for the exact amount of the borrowers' purported down payments conclusively establish that the seller made the down payments for *all* of the borrowers and that the borrowers in fact had no cash equity in the properties. Firstier has failed to come forward with any credible evidence to controvert these facts. The unsupported statements of Firstier's borrowers is not sufficient in the face of such evidence to get past summary judgment. On a motion for summary judgment the movant is not required to show that the evidence "unmistakably" is in its favor. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 252, (1986). The movant must show only that a "fair-minded jury could [not] return a verdict for the plaintiff on the evidence presented." *Id.* On this record and in light of the overwhelming documentary evidence adduced by IMI, it is clear that no jury could reasonably find that any of the borrowers made down payments or otherwise had cash equity in the property as represented to IMI.

15. The court concludes that there is no genuine issue as to any material fact and that IMI is entitled to a judgment as a matter of law. Because the insurance applications contained misrepresentations that were material to the risk assumed by IMI and because Firstier submitted the insurance applications fraudulently and in bad faith, the eight insurance policies at issue in this case are declared void.

In accordance with the foregoing findings of fact and conclusions of law, an order will be entered herein this day.

Dated this 3rd day of March, 1989.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE DISTRICT COURT
IN AND FOR
STATE OF OKLAHOMA

NO. CIV-87-564B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.
Defendants.

CAUSE

28 USC 1332: breach of insurance contract — tort bad faith

ATTORNEYS

PLAINTIFF:
Jack S. Dawson, Janice M. Dansby
MILLER, DOLLARHIDE, DAWSON & SHAW
1200 Colcord Building
Oklahoma City, Oklahoma 73102
405/236-8541

DEFENDANT:
Eric S. Gray
ROBERTS, GRAY, GORESEN & MORIARTY
Suite 1340
American First Tower
101 N. Robinson Ave.
Okla. City OK 73102
405/235-0123 (1)

CIV-87-564B

DATE	NR.	PROCEEDINGS
03-18-87	01	COMPLAINT
03-18-87	02	PRAECIPE For & Issd 1 Summs
03-31-87	3	RETURN of Serv re Summ:
		EXECUTED ON Investors Mortgage Ins., c/o Gerald Grimes, Ins. Comm., cert mail on 3-26-87 (20 days)
04-08-87	4	ENTER ORDER: This cs is transf to Honorable Luther Bohanon (ALLEY) ly
04-15-87	5	APPLICATION for Ext of Time to answ by dft w/s.
04-17-87	6	AMENDED COMPLAINT w/s.
04-20-87	7	ORDER granting dft's appl for ext of time to answer is ext 20 dys from April 15, 1987. (BOHANON)kb
5-01-87	8	APPLICATION for Ext of Time, to plead or ans by dft -w/s
5-04-87	9	ORDER that the time for ans the Compl by dft Investors Mortgage Ins Co is extended to 5-11-87 (BOHANON)kb
5-05-87		*SCHEDULING/STATUS CONF: Thurs, June 4, 1987 at 11:00 am (BOHANON) kb*
05-11-87	10	ANSWER, by dft w/s
05-29-87	11	STATUS Report, by ptys
06-04-87	12	SCH/STATUS CONF: ptys to exch wit & exh lists by 9-7-87; discvy c/off by 9-31-87; all dispositive mtns to be filed by 9-21-87 & resp 15 days t/a; req jury instructions to be submitted by 10-9-87; trial brfs to be

DATE	NR.	PROCEEDINGS
		filed by 10-9-87; final PT order to be subm to Ct by 10-1-87; all exhs intended to be offered to be premarked at least 5 days before trial; *Jury Trial sch for Oct 19, 1987 at 9:30 am* (BOHANON)kb
06-04-87	13	APPEARANCE of Jack Dawson as cnsl for plf
06-04-87	14	APPEARANCE of John P. Roberts & Eric S. Gray as cnsl for dft
06-10-87	15	NOTICE of Deposition, by dft -w/s
7-15-87		RETURN re serv of Subp DT
	16	EXECUTED on Bill Tucker, PPS, 7-14-87
07-13-87	17	NOTICE of Deposition, by dft
07-14-87	18	STIPULATION, by plf & dft
07-16-87	19	CERTIFICATE of Compl W/R.14(E), by plf -w/s
07-16-87	20	MOTION for Protective Order, by plf -w/s
07-17-87	21	PRAECIPE for Subp DT, by dft -w/s
07-17-87	22	NOTICE of Deposition, by dft -w/s
07-20-87	23	RETURN of Serv re Subp DT
		EXECUTED on Jim R. Artman on 7-17-87, by PPS
07-20-87	24	NOTICE of Deposition, by dft
07-20-87	25	PRAECIPE for Subp Dt, by dft
07-20-87	26	RESPONSE & Obj to Plf's Mtn for Protective Order & Brf in Supp Thereof, by dft -w/s
07-23-87	27	APPEARANCE of Janice M. Dansby as co-cnsl for plf
07-22-87	28	PRAECIPE For Subp Dt, by dft

DATE	NR.	PROCEEDINGS
07-22-87	29	NOTICE of Deposition, by dft -w/s
07-22-87	30	PRAECIPE for Subp Dt, by dft
07-22-87	31	NOTICE of Deposition, by dft -w/s
07-22-87	32	PRAECIPE for Subp DT, by dft -w/s
07-22-87	33	NOTICE of Deposition, by dft
07-23-87	34	REPLY Brf of Plf to Dft's Resp & Obj to Plf's Mtn for Plf's Mtn for Protective Order -w/s
07-23-87	35	HEARING: plf's Mtn for Protective Order is denied (BOHANON) kb
07-23-87	36	APPEARANCE of Linda J. Burgess as co-cnsl for dft
07-23-87	37	NOTICE of Deposition, by dft
07-23-87	38	PRAECIPE for & issd Subp DT, by dft
7-30-87	39	PRAECIPE for & issd subp DT, by dft
7-30-87	40	PRAECIPE for & issd subp DT, by dft
7-30-87	41	PRAECIPE for & issd subp DT, by dft
7-30-87	42	PRAECIPE for & issd subp DT, by dft
7-30-87	43	NOTICE of Depo of Custodian of Records for FDIC, Rcvr for Sec Natl Bank of Norman OK, by dft Invstrs Mrtg Ins Co -w/s
7-30-87	44	NOTICE of Depo of Custodian of Records for FDIC, Rcvr for Norman Bank of Commerce, by dft Invstrs Mrtg Co -w/s
7-30-87	45	NOTICE to Take Depo of Custodian of Records for FDIC, Rcvr for 1st Natl Bank & Trust Co of Norman, by

DATE	NR.	PROCEEDINGS
		dft -w/s
7-30-87	46	NOTICE to Take Depo of Custodian of Records for FDIC, Rcvr of Bank of Newcastle, by dft -w/s
7-31-87		RETURN re serv of subp DT
	47	EXECUTED on Custodian of Records FDIC, Rcvr for 1st Natl Bank of Commerce, 7-31-87, PPS
	48	EXECUTED on Custodian of Records FDIC, Rcvr for 1st Natl Bank & Trust Co of Norman, 7-31-87, PPS
	49	EXECUTED on Custodian of Records FDIC, Rcvr for Sec Natl Bank, 7-31-87, PPS
	50	EXECUTED on Custodian of Records FDIC, Rcvr Bank of Newcastle, 7-31-87, PPS
8-10-87	51	NOTICE of Depo of Henry M Staat, by dft -w/s
8-10-87	52	PRAECIPE for Subp DT, by dft -w/s
8-10-87	53	NOTICE of Depo of Janice Staat, by dft -w/s
8-10-87	54	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	55	NOTICE of Depo of Don Armstrong, by dft -w/s
8-10-87	56	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	57	NOTICE of Depo of Charles O. Wolfes, by dft -w/s
8-10-87	58	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	59	NOTICE of Depo of Mary Ann

DATE	NR.	PROCEEDINGS
		Wolfes, by dft -w/s
8-10-87	60	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	61	NOTICE of Depo of Keith Busking, by dft -w/s
8-10-87	62	PRAECIPE for & issd subp DT, by dft -w/s
8-10-87	63	NOTICE of Depo of Paul Busking, by dft -w/s
8-10-87	64	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	65	NOTICE of Depo of Glenda Largent, by dft -w/s
8-10-87	66	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	67	PRAECIPE for & issd Subp DT, by dft -w/s
8-10-87	68	NOTICE of Depo of Parke Largent -w/s
8-12-87		RETURN re serv of subp DT
	69	EXECUTED on Janice Staat, PPS, 8-11-87
	70	EXECUTED on Henry Staat, by serv Janice Staat, PPS, 8-11-87
	71	EXECUTED on Paula K. Bushing, PPS, 8-11-87
	72	EXECUTED on Charles Wolfes, PPS, 8-11-87
	73	EXECUTED on Mary Ann Wolfes, by serv Charles Wolfes, PPS, 8-11-87
	74	EXECUTED on Parke Largent, by serv Glenda Largent, PPS, 8-11-87

DATE	NR.	PROCEEDINGS
	75	EXECUTED on Glenda Largent, PPS, 8-11-87
8-14-87		RETURN re serv of subp DT
	76	EXECUTED on Keith Busking, PPS, 8-14-87
	77	EXECUTED on Don Armstrong, PPS, 8-14-87
8-17-87	78	PLAINTIFF'S & Dft's Joint Applctn for Ext of Deadlines -w/s
8-18-87	79	ORDER all dates ent at status conf of 6-4-87 ext 2 mos (BOHANON) ap
8-25-87	80	NOTICE of Depo of Larry Busking, by dft -w/s
9-1-87		*JURY DOCKET: Mon, 10-19-87, 9:30 am* (BOHANON) ap
9-2-87	81	ENTER ORDER striking Jury trial Oct 19 & resetting to the January 19, 1988 Trial Docket. (BOHANON) ap
9-3-87	82	PRAECIPE for & issd Subp DT, by dft
9-3-87	83	NOTICE of Depo, of Cust of Records for Sooner Fed S&L, by dft -w/s
10-13-87	84	NOTICE of Depo of Custodian of Records for City Natl Bank & Trust Co, by dft -w/s
10-28-87	85	PLAINTIFF'S & Dft's Joint Applctn for Ext of Time -w/s
10-29-87	86	ORDER deadlines ext to wits & exh lists 2-7-88; disco & dispos mtns 2-21-88; final PT ord 3-1-88; rspns to dispos mtns 3-6-88; req jury instrucs, voir dire & trial brfs 3-9-88; trial set 4-25-88 (BOHANON) ap
12-16-87	87	NOTICE of Change of Address by

DATE	NR	PROCEEDINGS
		cnsl for dft -w/s
2-3-88	88	JOINT Applctn for Ext of deadlines, by ptys
2-4-88	89	ORDER ext deadlines; ptys exch wits & exh lists 3-7-88; disco & dispos mtns 3-21-88; final PT Ord 4-1-88; rspns to dispo mtns 4-6-88; req jury instrucs, voir dire ques, trial brfs 4-9-88; trial date 4-25-88 (BOHANON) td
2-22-88	90	NOTICE to Take Depo of plf, by dft -w/s
2-22-88	91	NOTICE to Take Depo of plf, by dft -w/s
2-22-88	92	NOTICE to Take Depo of plf, by dft -w/s
3-2-88	93	JOINT Application for Ext of Deadline to Subm Wit & Exh Lists -w/s
3-8-88	94	PRAECIPE for & issd 1 subp, by dft
3-8-88	95	NOTICE of Depo of Bill Tucker, by dft -w/s
3-9-88	96	NOTICE of Depo of plf, by dft -w/s
3-9-88	97	NOTICE of Depo of plf, by dft -w/s
3-9-88	98	NOTICE of Depo of plf, by dft -w/s
3-9-88	99	ORDER ext deadline to subm wit & exh lists to 3-24-88 (BOHANON) ap
3-11-88		RETURN re serv of subp
	100	EXECUTED on Bill Tucker, PPS, 3-9-88
3-18-88	101	DEFENDANT'S Applctn for Ext of Deadlines -w/s
3-21-88	102	OBJECTION to dft's Applctn for Ext of Deadlines -w/s

DATE	NR.	PROCEEDINGS
3-21-88	103	ORDER grtg ext of deadlines: ptys exch wit & exh lists 5-23-88; disc & dispos mtns 5-20-88; final PT Ord 5-31-88; rspns to dispo mtns 6-5-88; req jury instrucs, voir dire & trial brfs 6-8-88; jury trial dkt 6-27-88 (BOHANON) ap
3-30-88	104	NOTICE of depo of Darlene Dawson, by dft -w/s
3-30-88	105	PRAECIPE for & issd 1 subp, by dft
4-01-88	106	DEFENDANT'S Mtn for SJ -w/s (Bound)
4-01-88	107	DEFENDANT'S Brf in Supp of Mtn for SJ -w/s (Bound)
4-05-88		RETURN re serv of subp
	108	EXECUTED on Darlene Dawson, PPS, 3-31-88
4-15-88	109	APPLICATION for Ext of Time to File Rspns to dft's Mtn SJ, by plf -w/s
4-18-88	110	ORDER FirsTier Mrtg Co grtd til 5-2-88 to rspnd to dft's Mtn SJ (BOHANON) ap
4-27-88	111	PLAINTIFF'S Mtn for Lv of Ct to File Partial Rspns to dft's Mtn for SJ & to Suspend Time to Completely Rspnd -w/s
4-29-88	112	ORDER plf grtd lv to partially rspnd to dft's Mtn SJ; time to completely rspnd to dft's Mtn SJ suspended til fur order of Ct; following brfg of iss by cnsl, Ct will set for oral arg; if plf wishes to file reply brf, file req to do so w/Ct (BOHANON) ap
4-29-88	113	APPLICATION to Strike Deadlines, or to Stay Deadlines, by dft -ws

DATE	NR.	PROCEEDINGS
5-02-88	114	PLAINTIFF'S Limited Rspns Brf to dft's Mtn SJ -w/s (Bound)
5-3-88	115	NOTICE of Service re mailing cpy of order of 4-28-88 to plf's atty, by dft's cnsl
5-5-88	116	ORDER Sched Conf to be conducted after Ct rules on applicability of 36 O.S. §3609 to this action, the deadlines will be reset (BOHANON) ap
5-16-88	117	APPLICATION for Ext of Time to File Rspns to plf's Limited Rspns to dft's Mtn SJ, by dft -w/s
5-17-88	118	ORDER Investors Mrtg Ins Co trtd til 5-27-88 to rspnd to plf's limited rspns to dft's Mtn SJ (BOHANON) ap
6-08-88	119	LETTER FM CT TO CNSL: SETTL CONF BEF MAG IRWIN, 06-24-88 AT 10:30 AM (BOHANON) fp
6-08-88	120	APPLICATION For Lv Of Ct To Resp To Dft's Resp To Plf's Limited Resp To Dft's Mtn for SJ, by plf, w/s
06-10-88	121	ORDER: Appl of Plf for lv to resp to Dft's Resp to Plf's Limited Resp to Dft's Mtn for SJ is grtd & said Resp is not to exceed 10 pgs in length & shall be filed by 06-17-88 (BOHANON) kb
5-27-88	122	DEFENDANT'S Resp To Plf's Limited Resp To Dft's Mtn for SJ, w/s
6-17-88	123	PLAINTIFF'S Rspns to dft's Rspns to plf's rspns to dft's Mtn SJ -w/s
6-20-88	124	LETTER fm dft to Mag Irwin re rescheduling setlmnt conf to July 22, 1988, 1:00 pm

DATE	NR.	PROCEEDINGS
7-26-88	125	APPLICATION to w/drw as cnsl of record, by Linda Burgess, cnsl for dft -w/s
7-26-88	126	ORDER permitting w/drwl of Linda Burgess, cnsl of record for dft Investors Mrtg Ins Co (BOHANON) ap
09-15-88	127	ORDER It is Ord that partial SJ be GRANTED to the dfts & Plfs be given 15 days to further resp to dft's mtn for SJ (BOHANON) fp (Micro/Sept '88)
9-29-88	128	APPLICATION For Ext of Time to fur resp to Dft's Mtn for SJ, by plf, w/s
9-29-88	129	ORDER: It is ordered that plf is grtd until 10-15-88 to fur resp to Dft's Mtn for SJ (BOHANON) jy
10-13-88	130	APPLICATION For Ext Of Time to fur resp to Dft's mtn for SJ, by plf, w/s
10-14-88	131	ORDER Denying Appl For Ext Of Time: It is ordered that plf's Appl for Ext of Time to resp to dft's Mtn for SJ is denied (BOHANON)
10-17-88	132	PLAINTIFF'S Resp To Dft's Mtn for SJ, w/s (BOUND)
10-17-88	133	BRIEF In Supp Of Plf's Resp To Dft's Mtn For SJ, w/s (BOUND)
10-17-88	134	PLAINTIFF'S Exhs & Depos To Plf's Resp To Dft's Mtn For SJ, Vol. I, (BOUND)
10-17-88	135	PLAINTIFF'S Exhs & Depos To Plf's Resp To Dft's Mtn For SJ, Vol. II, (BOUND)

DATE	NR.	PROCEEDINGS
10-19-88	136	APPLICATION For Lv To File Reply To Plf's Resp To Mtn For SJ, by dft. w/s
10-20-88	137	ORDER Grtg Lv To File Reply: It is ordered that dft is grtd 15 days or until 11-02-88 to file Reply to Plf's Resp to Dft's Mtn for SJ (BOHANON) jy
11-02-88	138	DEFENDANT'S Reply to Plf's Resp to Dft's Mtn For SJ, w/s (BOUND COPY)
11-08-88	139	APPLICATION For Lv To Resp To Dft's Reply To Plf's Resp To Mtn For SJ, by plf, w/s
11-08-88	140	ORDER Grtg Lv To File Resp: It is ordered that plf is grtd 15 days or until 11-17-88 to file Resp not to exceed 20 pgs in length, to Dft's Reply to Plf's Resp to Dft's Mtn for SJ. No fur ext will be grtd (BOHANON) jy
11-17-88	141	RESPONSE to dft's Reply to plf's Rspns to dft's mtn SJ -w/s (bound)
11-23-88	142	APPLICATION for Lv to File Suppl Brf in Supp of Mtn SJ -w/s
11-30-88	143	MOTION to Suppl Rspns, by Firstier -w/s
11-30-88	144	PLAINTIFF'S Objctn to dft's applctn for Lv to File Suppl Brf in Supp of Mtn for SJ or in altrntv Mtn for Lv to file suppl Brf -w/s
12-01-88	145	ORDER plf Firstier Mrtg grtd lv to supplmnt rspns by filing affdvt of Kenneth McBride, Pres of American-First Abstract Co (BOHANON) ap

DATE	NR.	PROCEEDINGS
12-01-88	146	ORDER dft Investors Mrtg Ins Co grtd lv to file supplmntry brf in supp of Mtn SJ; supplmntry brf attached as exh B to dft's applctn for lv to file supplmntry brf in supp of Mtn SJ deemed to be filed on this date (BOHANON) ap
12-01-88	147	SUPPLEMENTARY Brf in Supp of Mtn SJ, by dft -w/s
01-20-89		*HRG ON DFT'S MTN SJ: Thurs, 1-26-89, 11:00 am* (BOHANON) ap
01-26-89	148	HRG ON DFT'S MTN SJ: cnsl apr & Ct hrs oral args fm both sides; Ct advises policy should be &/or cancelled as void for want of fraud, bad faith; no evidence in hrg to hold policy void; dft's cnsl to subm sugg FF&CofL as to ea loan w/i 10 days & send cpy to plf's cnls & plf's cnls to obj or sugg FF&CofL 5 days t/a; Ct will then modify, add to or delete & enter own FF&CofL (BOHANON) ap
2-8-89	149	NOTICE Of Appeal by plf fm ruling ent 1-26-89-w/s #89-6042
2-8-89		RECEIVED $105.00 filing & dktg fees on Appeal. Receipt #78004
2-8-89	150	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, notice & dkt sheet as prelim record to CCA & cnsl -sa
02-10-89	151	DEFENDANT'S Applctn for Award of atty's fees & supp brf -w/s
02-13-89	152	FIRSTIER'S Suggested Findings of Fact & Conclusions of Law -w/s
02-13-89	153	OBJECTION to dft's Sugg Findings of Fact & Conclusions of Law, by plf, -w/s

DATE	NR.	PROCEEDINGS
02-10-89		BILL of Costs in amt of $10,213.12 agst Firstier Mrtg Co (hrg set 3-9-89, 9:00 am)
02-24-89	154	ENTRY of Aprnc & Notice of Change of Address, by Eric Gray, prev w/firm of Edwards Roberts & Propester, cnsl of record for dft -w/s
02-24-89	155	PLAINTIFF'S Objctn to dft's Mtn for Atty Fees -w/s
02-24-89	156	PLAINTIFF'S Objctn to dft's Bill of Costs -w/s
02-28-89	157	NOTICE of transc ord (TR not necessary) cc: CCA & cnsl -sa
03-03-89	158	MEMORANDUM Opinion & Order Ct concludes that there is no genuine iss as to any material fact & that IMI entitled to jdgmnt as matter of law; because insurance applications contained misrepresentations that were material to risk assumed by IMI & because Firstier subm ins applications fraudulently & in bad faith, the 8 ins policies at iss in this case are declared void (BOHANON) (ap)
03-03-89	159	ORDER & Judgment consistent w/memo opinion ent, the following policies issed by Investors Mrtg Ins Co to Firstier Mrtg Co are void & are unenforceable: Policy #456987, 456988, 457066, 457078, 457225, 457246, 457247, 457224; jdgmnt is rendered in favor of dft & agst plf (BOHANON) (MICRO-MAR) (ap)
03-08-89	160	ENTER ORDER case set for hrg on dft's Applctn for atty fees on Fri, 4-7-89 at 10:00 am (BOHANON) (alp)

DATE	NR.	PROCEEDINGS
03-08-89		*HEARING ON DFT'S APPLCTN FOR ATTY FEES: FRI, 4-7-89, 10:00 am* (BOHANON) (alp)
03-08-89	161	APPEARANCE of Gregory F. Pilcher, cnsl for dft Investors Mrtg Ins Co.
03-20-89	162	ENTER ORDER case prev set for Hrg on Dft's Applctn for Atty Fees on Fri, 4-7-89 strkn & reset for Thurs, 4-6-89 at 10:00 am (BOHANON) (alp)
03-20-89		*HEARING ON DFT'S APPLCTN FOR ATTY FEES: Thurs, 4-6-89 10:00 am* (BOHANON) (alp)
03-15-89	163	DEFENDANT'S Supplementary Applctn for Award of Atty's Fees & Supp Brf -w/s
03-16-89	164	COSTS Taxed in amt of $5221.40 for dft (CLERK) (MICRO-MAR'89) (alp)
03-27-89	165	MOTION for De Novo Review of Clk's Taxation of Costs & Brf in Supp, by dft -w/s
03-28-89	166	PLAINTIFF'S Objctn to dft's Supplmntry Applctn for Award of Atty's Fees -ws (ap)
04-03-89	167	PRAECIPE for & issd 1 subp, by dft
04-06-89	168	HEARING ON ATTY FEES: cnsl apr; Ct hrs oral args on Mtns; by stipulation, dft w/drws Mtn for Review of taxation of costs; ptys stipulate to atty fees for dfts to be $60,000 if Ct finds Investors Mortgage Ins to be prevailing pty; Mtn for atty fees taken under advisement & Ct to iss formal order (BOHANON)

DATE	NR.	PROCEEDINGS
04-06-89	169	STIPULATION by all ptys, as more fully set out -w/s (ap)
04-06-89	170	ORDER IMI's applctn & suppl applctn for atty's fees grtd in amt of $60,000.00 (BOHANON) (ap)
04-12-89	171	NOTICE Of Appeal by plf fm ord ent 4-6-89-w/s
04-12-89		RECEIVED $105.00 filing & dktg fees on Appeal. Receipt #79456
04-13-89	172	CLERK'S ltr re serv of Notice of Appeal, w/cpy ltr, notice & dkt sheet as prelim record to CCA & cnsl -sa
04-14-89	173	APPLICATION for Ext of Time to File Notice of Appeal, by plf -w/s (ap)
04-14-89	174	ENTER ORDER: dft Investors Mortgage Ins Co ordered to file its rspns to Firstier Mortgage Co's Appl for Ext of Time to File Notice of Appeal by 4-24-89 (BOHANON) (ap)
04-18-89	175	OBJECTION to plf's Appl for Ext of Time to File Notice of Appeal, by dft -ws (ap)
04-20-89	176	APPLICATION for Lv to File Rspns to dft's Objctn to Firstier's Appl for Ext of Time to File Notice of Appeal, by plf -w/s (ap)
04-24-89	177	ORDER Plf Firstier Mortgage Co grtd to 5-1-89 to file Notice of Appeal (BOHANON)
04-24-89	178	NOTICE of transc ord (Dansby) (TR not necessary) cc: CCA & cnsl -sa

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the decision orally rendered by the District Court at the January 26, 1989 hearing was final in light of the fact that the Court requested Defendant-Respondent to submit suggested findings of fact and conclusions of law, that the Court then allowed Plaintiff-Petitioner a specified period of time to respond to the suggested findings and conclusions, and that the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law and judgment?

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order?

TABLE OF CONTENTS

Page(s)

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED 1

STATEMENT OF THE CASE 2

LEGAL ARGUMENTS AND AUTHORITIES 4

THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED 4

A. THE PRELIMINARY DECISION ORALLY RENDERED BY THE TRIAL COURT AT THE JANUARY 26, 1989 HEARING WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED THAT THE ORAL ANNOUNCEMENT WOULD BE FOLLOWED WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT 5

B. THE FEBRUARY 8, 1989 NOTICE OF APPEAL WAS FILED PREMATURELY AND IS INEFFECTIVE 8

C. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *BANKER'S TRUST CO. v. MALLIS* 10

D. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE DOES NOT VALIDATE THE PREMATURE NOTICE OF APPEAL 13

1. Rule 4(a)(2) Does Not Render the Premature Notice Effective Because the Notice Was Not Filed After Announcement of a Final Decision 14

2. The Court of Appeals' Decision Does Not Conflict with Decisions From Other Circuits 16

Page(s)

3. Even if Rule 4(a)(2) Could Otherwise be Read to Validate the February 18, 1989 Notice of Appeal, that Notice was Rendered a Nullity Because it was Filed Before Judgment was Rendered on a Rule 4(a)(4) Tolling Motion 18

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:	Page(s)
Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986)	19
Agostino v. Ellamar Packing Co., 191 F.2d 11 (5th Cir. 1988)	20, 21
Alcom Electronic Exchange, Inc. v. Burgess, 849 F.2d 964, (5th Cir. 1988)	18
Allen v. Horinek, 827 F.2d 672 (10th Cir. 1987), *cert. denied* 108 S.Ct. 2883	19
Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977)	9
Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978)	10, 11, 12, 13
Carnes v. United States, 279 F.2d 378 (10th Cir. 1960), *cert. denied* 364 U.S. 846 (1960)	6, 7
Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945)	6
Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979)	6, 9, 17
Craig v. Lynaugh, 846 F.2d 11 (5th Cir. 1988)	20
Director of Revenue, State of Colorado v. United States, 392 F.2d 307 (10th Cir. 1968)	7, 21
Dowling v. City of Philadelphia, 855 F.2d 136 (3rd Cir. 1988)	16, 18
Euziere v. United States, 266 F.2d 88 (10th Cir. 1959), *vacated on other grounds*, 364 U.S. 282, 80 S.Ct. 1615, 4 L.Ed.2d 1720 (1960)	9
General Television Arts, Inc. v. Southern Railway Co., 725 F.2d 1327 (11th Cir. 1984)	14, 15, 16

Cases:	Page(s)
Greenwood v. Greenwood, 234 F.2d 276 (3rd Cir. 1956)	20
Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1978)	6, 19, 20
Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988)	14
Lewis v. United States Postal Service, 840 F.2d 712 (9th Cir. 1988)	17, 20
Martinez v. Sullivan, 874 F.2d 751 (10th Cir. 1989)	21
Maryland Casualty Co. v. Conner, 382 F.2d 13 (10th Cir. 1967)	6
Osterneck v. E.T. Barwick Ind., Inc., 825 F.2d 1521 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ____ U.S. ____ , 109 S.Ct. 987, 103 L.Ed.2d 819 (1987)	14, 17, 20
Robinson v. Tanner, 798 F.2d 1378 (11th Cir. 1986), *cert. denied* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987)	14, 15, 17, 18
Sacks v. Rothberg, 845 F.2d 1098 (D.C. Cir. 1988)	16, 18
United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958)	8
United States v. Green, 847 F.2d 622 (10th Cir. 1988)	17
United States v. Hansen, 795 F.2d 35 (7th Cir. 1986)	14, 15
United States v. Taylor, 632 F.2d 530 (5th Cir. 1980)	18
White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 102 S.Ct. 1162, 7 L.Ed.2d 325 (1982)	21

Statutes:	Pages
28 U.S.C. §1291	1, 6, 14, 17
28 U.S.C. §1332	2
28 U.S.C. §2107	10, 11

Other:	
Fed. R. App. P. 1(b)	14
Fed. R. App. P. 4(a)(1)	5, 8, 9
Fed. R. App. P. 4(a)(2)	1, 13, 14, 15 16, 17, 18, 21
Fed. R. App. P. 4(a)(4)	1, 18, 19, 21
Fed. R. Civ. P. 50(b)	1, 18
Fed. R. Civ. P. 52(b)	1, 18, 20, 21
Fed. R. Civ. P. 54(b)	14, 16, 17
Fed. R. Civ. P. 58	4, 10, 11
Fed. R. Civ. P. 59	1, 18, 19
Fed. R. Civ. P. 59(e)	20, 21
Fed. R. Civ. P. 79(a)	4, 10
Fed. R. Crim. P. 11(a)(2)	17
Fed. R. Crim. P. 52(a)	17
Notes of Advisory Committee on Rules, Fed. R. Civ. P. Rule 58 (West Pub. Co.), 28 U.S.C.A. at 642	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

In addition to 28 U.S.C. §1291 and Fed. R. App. P. 4(a)(2), which are cited and reproduced at pages 1-2 of the Petition for a Writ of Certiorari, this case also involves Fed. R. App. P. 4(a)(4). Fed. R. App. P. 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order

denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

STATEMENT OF THE CASE

The Petitioner, Firstier Mortgage Co. ("Firstier") commenced this litigation when it brought suit to recover on eight policies of private mortgage insurance which were underwritten by the Respondent, Investors Mortgage Insurance Co. ("IMI")[1]. The trial court's jurisdiction was grounded on 28 U.S.C. §1332. IMI moved for summary judgment on the grounds that the policies were rendered void and unenforceable because of fraud and material misrepresentations made by and in behalf of Firstier in the insurance applications.

On January 26, 1989 the trial court heard oral argument on IMI's Motion For Summary Judgment. After hearing oral argument, the trial court announced that "the policies should be and are cancelled as void for want of fraud, bad faith." *See* January 26, 1989 Transcript of Hearing Before the Honorable Luther L. Bohanon, United States District Judge (hereafter, "Tr. 1/26/89"), attached as Appendix C to the Petition for a Writ of Certiorari, at page 15.

[1] IMI's parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates are: Investors Mortgage Insurance Holding Company; Investors Equity Insurance Company, Inc.; Financial Products and Services, Inc. (formerly Investors Conduit Corp.); and Investors Mortgage Financial Services, Inc.

At the January 26, 1989 hearing the trial court requested IMI to submit suggested findings of fact and conclusions of law. The trial court specifically advised the parties that after giving Firstier an opportunity to object to IMI's suggested findings and conclusions, the trial court would write its own findings of fact and conclusions of law *and judgment*. Tr. 1/26/89, Appendix C to the Petition in Error at 15-16. The trial court said:

> The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.

Id. at 15.

On February 8, 1989, Firstier filed a Notice of Appeal from the January 26, 1989 oral announcement. Subsequently, on February 13, 1989, Firstier filed what it called its "Objection to Defendant's Suggested Findings of Facts and Conclusions of Law." Firstier's "Objection" controverts virtually every suggested finding and conclusion submitted by IMI. In fact, Firstier's "Objection" concludes with the assertion that "IMI is not entitled to summary judgment." Doc. 153 at 21. Firstier's "Objection" is attached hereto as Appendix "A".

On February 13, 1989, Firstier also filed a separate document which it called "Firstier's Suggested Findings of Fact and Conclusions of Law." Firstier's "Suggested Findings" is an argumentative document that reasserts virtually every factual and legal argument that Firstier had made in opposition to IMI's Motion for Summary Judgment. As with the February 13, 1989 "Objection",

Firstier's "Suggested Findings" argue for findings and conclusions which are directly contrary to those submitted by IMI. Firstier's "Suggested Findings" conclude by urging the trial court to reverse the January 26, 1989 oral announcement and to find that "IMI is not entitled to summary judgment." Doc. 152 at 19. Firstier's "Suggested Findings" are attached hereto as Appendix "B".

On March 3, 1989, the trial court formally rendered its "Order and Judgment" in favor of IMI, thereby implicitly overruling Firstier's "Objections" and "Suggested Findings". Appendix "D" to the Petition for a Writ of Certiorari. Also on March 3, 1989, the Court separately rendered a "Memorandum Opinion" which contained the Court's findings of fact and conclusions of law. Appendix "E" to the Petition for a Writ of Certiorari. The Court's Memorandum Opinion is reported at 708 F. Supp. 1224 (W.D. Okl. 1989). On March 3, 1989, the final "Order and Judgment" of the trial court was entered on the clerk's docket pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure. Appendix "F" to the Petition for a Writ of Certiorari.

LEGAL ARGUMENTS AND AUTHORITIES

PROPOSITION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The January 26, 1989 oral announcement was an interlocutory, nonappealable decision. The trial court requested that the Respondent prepare suggested findings of fact and conclusions of law and allowed the Petitioner a specified period of time to respond thereto. The trial court ex-

pressly informed the parties that after reviewing the suggested findings and conclusions, the court would "modify, add to or delete" from them as the court deemed appropriate and would then "write its own findings of fact and conclusions of law and judgment." Thus, the court clearly indicated its intent to retain jurisdiction over the case until it entered a final order.

Further, the oral announcement was treated as interlocutory by the parties. Both parties submitted suggested findings of fact and conclusions of law. In fact, the Petitioner even urged the Court to reverse its preliminary decision and to find that the Respondent was *not* entitled to summary judgment. There is no real conflict among the circuits that under such circumstances the oral announcement was an interlocutory, not a final, decision and that the Court of Appeals properly declined jurisdiction. Consequently, a review on certiorari is neither necessary nor appropriate and the Petition for a Writ of Certiorari should be denied.

A. THE PRELIMINARY DECISION ORALLY RENDERED BY THE TRIAL COURT AT THE JANUARY 26, 1989 HEARING WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED THAT THE ORAL ANNOUNCEMENT WOULD BE FOLLOWED WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

Under Fed. R. App. P. 4(a)(1), a notice of appeal in a civil case must be filed within thirty days after entry of the judgment or order from which appeal is taken. This time limit is "man-

datory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1978); *Maryland Casualty Co. v. Conner,* 382 F.2d 13, 15 (10th Cir. 1967). Further, 28 U.S.C. §1291 vests the Courts of Appeals with appellate jurisdiction only over "final decisions" of the district courts. In pertinent part, §1291 provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

The Supreme Court has long held that a final decision under §1291 is one which "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *Accord, Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 565 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). Measured by this standard, the trial court's oral announcement at the January 26, 1989 hearing was not a final decision. Indeed, at the January 26, 1989 hearing the trial court requested IMI to submit suggested findings and conclusions and made clear that after modifying, adding to, or deleting from IMI's suggested findings the trial court would write its own findings and conclusions and judgment. Under such circumstances the oral announcement is not a final appealable decision under 28 U.S.C. §1291. *Carnes v. United States,* 279 F.2d 378, 379-80 (10th Cir. 1960), *cert. denied,* 364 U.S. 846 (1960).

In *Carnes,* the Tenth Circuit held that an oral announcement cannot constitute a final decision

when the trial court indicates that it intends to follow the oral announcement with a formal judgment:

> For the purpose of an appeal, a final judgment is the court's act or pronouncement which disposes of the matter under consideration .... When the Judge acts in a manner which clearly indicates his decision that the act shall be the final one in the case and a notation of the act has been entered on the docket, the time to appeal begins to run under Rule 73(a). But if it is not clearly indicated that the Judge's act was intended to be his final act in the case, and if it appeared that a formal judgment is contemplated, then the time for appeal does not begin to run.

Id. at 379-380 (citations omitted). The *Carnes* Court concluded:

> From the record as a whole, including the showing that a formal order was signed at a later date, we conclude that the judge did not intend his declaration from the bench to be his final act, but did intend that a formal order denying the motion would be prepared and signed by him.

Id. at 380 (footnote omitted). *Accord Director of Revenue, State of Colorado v. United States,* 392 F.2d 307, 309 (10th Cir. 1968) ("where the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the court").

The Supreme Court has held similarly:

> "Where, as here, a final judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or docket entry. * * * The judge was con-

> scious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran."

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 235, 78 S.Ct. 674, 679, 2 L.Ed.2d 721 (1958).

Pursuant to these authorities, because the trial court indicated that it would enter formal findings and conclusions and a separate judgment, and because the trial court expressly reserved the right to modify, add to, or delete from the suggested findings, it is clear that the oral announcement was not a final appealable decision. Consequently, the Court of Appeals properly dismissed Firstier's appeal.

B. THE FEBRUARY 8, 1989 NOTICE OF APPEAL WAS FILED PREMATURELY AND IS INEFFECTIVE.

Rule 4(a)(1) of the Rules of Appellate Procedure provides, in pertinent part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty days after the date of entry of the judgment or order appealed from.

The January 26, 1989 oral announcement was not a final decision because the court evidenced its intention to retain jurisdiction and to write its own findings of fact and conclusions of law and judgment. Final judgment was not entered until March 3, 1989, when the court filed its "Memorandum Opinion" and a separate "Order and Judgment" and the same was entered on the clerk's docket. Consequently, the February 8, 1989 Notice of Appeal, filed before final judgment was rendered, was premature under Rule 4(a)(1) and was ineffective to vest the Court of Appeals with appellate jurisdiction:

> "Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court . . . An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction."

Century Laminating, Ltd. v. Montgomery, 585 F.2d 563, 567 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). *Accord Euziere v. United States*, 266 F.2d 88, 91 (10th Cir. 1959), *vacated on other grounds*, 364 U.S. 282, 80 S.Ct. 1615, 4 L.Ed.2d 1720 (1960); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977).

The *Century Laminating* Court concluded by noting that when a premature appeal is filed interests of justice *do not* require the Court to give effect to the appeal; instead, the Court held that the "virtue in finality" mandates dismissal "especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself". *Id.* at 568. Because the January 26, 1989 oral

announcement was not intended as the court's final act, the oral announcement was not a final decision, the appeal was premature, and the Court of Appeals properly dismissed the case for want of jurisdiction.

C. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH BANKER'S TRUST CO. V. MALLIS.

The Federal Rules of Civil Procedure require that all judgments be set forth on a separate document and provide that a judgment is not effective until entered on the civil docket. Specifically, Fed. R. Civ. P. 58 provides in part:

> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

The Advisory Committee that drafted the separate-document requirement noted that prior to its adoption there was confusion over whether words contained in a written opinion or memorandum, like " 'the plaintiff's motion [for summary judgment] is granted,' " constitutes a final decision. The Advisory Committee reasoned that the separate-document requirement "eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment." *See* Notes of Advisory Committee on Rules, Fed. R. Civ. P. Rule 58 (West Pub. Co.), 28 U.S.C.A. at 642. The Supreme Court has recognized that "[t]he sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C.

§2107 begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (footnote omitted).

The January 26, 1989 oral announcement did not satisfy the requirements of Rule 58. The oral announcement was not a final judgment; therefore, it was not set forth on a separate document and was not entered on the clerk's docket. However, Firstier relies on *Bankers Trust* to argue that the parties "waived" the separate-document requirement. To be sure, the *Bankers Trust* case did hold that in an appropriate case the separate-document rule could be waived; however, the *Bankers Trust* case was limited to the situation where judgment has been entered on the clerk's docket but the separate document required by Rule 58 "has *accidentally* not been entered." *Bankers Trust*, 425 U.S. at 388, 98 S.Ct. at 1121 (emphasis added).

Significantly, the appeal in the *Bankers Trust* case was taken from a combined opinion and order of the trial court which expressly concluded: " 'Complaint dismissed in its entirety. So ORDERED.' ". Further, an entry was made on the clerk's docket on the same day containing those same words. *Id.* at 382, n. 1, 98 S.Ct. at 1119, n. 1. The *Bankers Trust* Court reasoned that under such circumstances the Court of Appeals could properly assert appellate jurisdiction. The Supreme Court's analysis is instructive:

> "[T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal

was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment."

Bankers Trust, 435 U.S. at 387-388, 98 S.Ct. at 1127.

None of these circumstances are present in the instant case. First, the trial court did not indicate that its oral announcement would represent the final decision in the case. On the contrary, the trial court ordered IMI to prepare suggested findings of fact and conclusions of law, expressly granted Firstier the opportunity to submit objections to IMI's suggested findings and conclusions, and advised the parties that "[t]he Court will then modify, add to it, delete and write its own findings of fact and conclusions of law *and judgment* on each of these eight policies that we have talked about." Transcript 1/26/89, Appendix "C" to Petition for a Writ of Certiorari at 15-16 (emphasis added).

Second, the parties did not waive the separate-document requirement. Pursuant to the Court's request, both parties subsequently submitted suggested findings of fact and conclusions of law and awaited the trial court's own findings of fact and conclusions of law *and judgment.* Third, the trial court's oral announcement was not entered in the clerk's docket because it was not intended as a judgment — as noted, the trial court expressly said at the January 26, 1989 hearing that it would write its own findings of fact and conclusions of law *and judgment.*[2]

[2] The docket entry on January 26, 1989 merely recites that the hearing occurred, that the trial court heard oral argument, that the trial court indicated that the policies should be cancelled, that the parties should submit suggested findings of fact and conclusions of law, and that the trial court would modify, add to, or delete from the suggested findings and conclusions and enter its own. *See* Civil Docket attached as Appendix "F" to the Petition for a Writ of Certiorari. The judgment of the trial court was not entered in the civil docket until March 3, 1989 when the court rendered its "Memorandum Opinion and Order" and a separate "Order and Judgment." *Id.*

Unlike the situation in *Bankers Trust,* the fact that a judgment was not set forth on a separate document on January 26, 1989 was not an "error" or an "accident". The trial court did not intend that its oral announcement would be its final decision and the parties did not "waive" the separate-document requirement. Under such circumstances, the January 26, 1989 oral announcement cannot be considered a final decision and the *Bankers Trust* case is inapplicable.

D. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE DOES NOT VALIDATE THE PREMATURE NOTICE OF APPEAL.

Rule 4(a)(2) of the Rules of Appellate Procedure provides:

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

Rule 4(a)(2) does not operate to render the February 8, 1989 Notice of Appeal effective because the January 26, 1989 oral announcement was not a final decision. Moreover, even if the January 26, 1989 oral announcement was a final decision, Rule 4(a)(2) does not save the premature appeal because the Petitioner filed a tolling motion before entry of judgment which rendered the February 8, 1989 Notice of Appeal a nullity.

1. Rule 4(a)(2) Does Not Render the Premature Notice Effective Because the Notice Was Not Filed After Announcement of a Final Decision.

By its express terms, Rule 4(a)(2) validates a premature notice of appeal only when the notice is filed after a decision or order but before the entry of judgment. In light of Rule 1(b) which explicitly provides that the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law," Rule 4(a)(2) can be read *only* to validate premature appeals taken from "final decisions" as that term is used in 28 U.S.C. §1291. *General Television Arts, Inc. v. Southern Railway Co.*, 725 F.2d 1327, 1330-1331 (11th Cir. 1984); *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987); *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987). Indeed, it is only from such final decisions that §1291 confers appellate jurisdiction on the courts of appeals. *Id. See also Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 647 (10th Cir. 1988) (dissenting opinion).

This is the precise issue that was before the Eleventh Circuit in *General Television, supra.* The appellant had filed its notice of appeal after the trial court had entered a *partial* summary judgment but before the entry of a final decision. The premature appeal could not be saved by a Rule 54(b) certification because the partial summary judgment went only to the issue of liability.

Therefore, the appellant argued that the Court should give Rule 4(a)(2) a liberal reading and allow the appeal. The Court refused, holding that Rule 4(a)(2) validated only those premature notices of appeal that are filed after announcement of a *final* judgment but before the final judgment is formally entered:

> "The purpose of that rule is to avoid the harsh result that may obtain when a district court has announced its final judgment and zealous counsel in his haste to file a notice of appeal does so before the district court formally enters the order containing its judgment. The rule was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. Hence this Court and its predecessor continue to hold after the enactment of Rule 4(a)(2) in 1979 that a final judgment does not "retroactively validate the premature notice of appeal." . . . Consequently, Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal *after* the announcement of judgment but before the entry of the order.
>
> There was no announcement of the final judgment prior to GTA's filing of the notice of appeal . . . . Consequently, the district court's certification for interlocutory appeal of its partial summary judgment on liability cannot be considered an announcement of final judgment. Because this court is without jursdiction, the APPEAL IS DISMISSED."

General Television, 725 F.2d at 1330-31 (citations and footnotes omitted). *Accord, Hansen*, 795 F.2d at 38, *Robinson*, 798 F.2d at 1382-83.

General Television and the authorities cited above comport with the plain meaning of Rule 4(a)(2) and establish that the February 8, 1989 Notice of Appeal is ineffective because it was filed after entry of an interlocutory, not a *final* decision. Accordingly, the Court of Appeals in the instant case properly dismissed the appeal.

2. The Court of Appeals' Decision Does Not Conflict With Decisions From Other Circuits.

Firstier argues that the Court of Appeals' decision in this case conflicts with decisions from the District of Columbia and Third Circuit, citing *Sacks v. Rothberg,* 845 F.2d 1098 (D.C. Cir. 1988) and *Dowling v. City of Philadelphia,* 855 F.2d 136 (3rd Cir. 1988). However, the *Sacks* and *Dowling* cases involved situations where the trial courts had entered summary judgments disposing of some but not all of the claims at issue. The parties against whom judgment had been rendered filed appeals before judgment was entered on the remaining claims and without first obtaining Rule 54(b) certifications. Both Courts held that the respective appeals ripened when the remaining claims were finally disposed of. *Sacks,* 845 F.2d at 1099; *Dowling,* 855 F.2d at 138.

The *Sacks* and *Dowling* decisions do not conflict with the Court of Appeals' decision in this case. Rather, they are consistent with the general rule recognized in all circuits, *including the Tenth Circuit,* that in cases involving multiple claims and multiple parties, a notice of appeal filed after entry of an interlocutory order disposing of some but not all of the claims or parties may nevertheless be rendered effective if the interlocutory order is later rendered final by disposing of the remaining claims or by subsequently entering a Rule 54(b) certification. *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641, 643-644 (10th Cir. 1988). In fact, this is the precise context in which the Tenth Circuit recently held that Fed. R. Civ. P. 4(a)(2) permits the interpretation that a subsequent Rule 54(b) certification ripens a premature notice and saves the appeal. *Id.* at 645.

Critically, in a Rule 54(b) situation, the otherwise "premature" appeal satisfies the jurisdictional requirements imposed by 28 U.S.C. §1291 because a Rule 54(b) certification can be granted only where the decision appealed from finally disposes of an entire claim or party. Obviously, this rationale is inapplicable where, as here, the decision appealed from is not final because the trial court has retained power to amend the judgment and has indicated its intent to prepare a formal judgment and separate findings and conclusions as to all claims. *See Osterneck v. E.T. Barwick Ind., Inc.,* 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney,* ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); *Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 566 (10th Cir. 1979), *cert. dismissed,* 444 U.S. 987 (1979); *Robinson v. Tanner,* 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied,* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).[3] Thus the

[3] Petitioner's reliance on *United States v. Green,* 847 F.2d 622 (10th Cir. 1988), is misplaced. *Green* involved an appeal from a *criminal* conviction and was expressly grounded on the "harmless error" doctrine expressed in Fed. R. Crim. P. 52(a). *Id.* at 624-25. Further, the appeal was taken only after Green entered a conditional plea of guilty under Fed. R. Crim. P. 11(a)(2), which permits an appeal of "the adverse determination of any specified pretrial motion". There are no

Sacks and *Dowling* cases are inapposite and do not conflict with the Court of Appeals' decision in this case.[4]

3. Even if Rule 4(a)(2) Could Otherwise be Read to Validate the February 18, 1989 Notice of Appeal, that Notice was Rendered a Nullity Because it was Filed Before Judgment was Rendered on a Rule 4(a)(4) Tolling Motion.

Rule 4(a)(2) validates premature notices of appeal filed after the announcement of a final decision "except as provided" in Rule 4(a)(4). *See* Rule 4(a)(2) of the Rules of Appellate Procedure. Rule 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order

similar rules at issue in the instant case.

[4] Only the Fifth Circuit has held that Rule 4(a)(2) validates a premature appeal taken from an interlocutory decision. *Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988). However, *Alcom* does not present a real conflict between the circuits because *Alcom* was not an *en banc* decision. The *Alcom* panel acknowledged that its decision conflicted with prior Fifth Circuit precedent, *see United States v. Taylor*, 632 F.2d 530 (5th Cir. 1980), but concluded that it was required to follow a previous panel decision which preceded the *Taylor* case. *Alcom*, 849 F.2d at 967-968. Even so, the *Alcom* court stated that the *Taylor* rule, and not the rule adopted by the *Alcom* panel, was the better reasoned approach. *Id.* at 967-969. In *Robinson v. Tanner*, 798 F.2d 1378 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987), the Eleventh Circuit attempted to reconcile the conflicting Fifth Circuit precedent and concluded that no real conflict existed.

> denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

The Supreme Court has made clear that a notice of appeal filed before entry of judgment on one of the motions listed in Rule 4(a)(4) is a nullity. In *Acosta v. Louisiana Department of Health and Human Resources*, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) the Supreme Court articulated the effect of a Rule 4(a)(4) tolling motion as follows:

> "Rule 4(a)(4) constitutes an exception to the general rule that a notice of appeal filed after announcement of an order but before its entry in the docket will be deemed timely filed .... [Rule 4(a)(4)] establish[es] the rule that a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies."

Accosta, 106 S.Ct. at 2878. *Accord Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2883. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), the Supreme Court reached a similar conclusion as to the effect of a Rule 4(a)(4) motion on a notice of appeal filed before entry of judgment on the motion:

> The notice of appeal filed in this case on November 19, 1980, was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal

> 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'

Griggs, 103 S.Ct. at 403 (citations and footnotes omitted).

Firstier filed two pleadings on February 13, 1989 which it called "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law" and "Firstier's Suggested Findings of Fact and Conclusions of Law", respectively. Both pleadings assail the decision announced by the trial court at the January 26, 1989 hearing and argue for findings and conclusions that support a decision in favor of Firstier on IMI's Motion for Summary Judgment. Both pleadings specifically urge the trial court to find that "IMI is not entitled to summary judgment." *See* Appendices "A" and "B". Consequently, the two pleadings must be categorized either as a request under Rule 52(b) to amend or make additional findings of fact or a request under Rule 59(e) to alter or amend the judgment.[5] *See generally Osterneck v. Ernst & Whinney,* ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d

[5] Rule 52(b) and Rule 59(e) both require that motions made under those rules be made "not later than 10 days after entry of judgment." Thus Firstier's motions are untimely with respect to the January 26, 1989 interlocutory oral announcement. However, Firstier's motions were made "not *later* than 10 days after entry of" the March 3, 1989 final judgment and are thus timely. Courts construing Rule 52(b) and Rule 59(e) have held that motions filed pursuant to those rules are valid even when they are filed before entry of final judgment. *Craig v. Lynaugh,* 846 F.2d 11, 13 (5th Cir. 1988); *Agostino v. Ellamar Packing Co.,* 191 F.2d 576, 577 (9th Cir. 1951); *Lewis v. United States Postal Service,* 840 F.2d 712, 713-714 (9th Cir.1988); *Greenwood v. Greenwood,* 234 F.2d 276, 278 (3rd Cir. 1956).

146 (1989) (a motion falls under Rule 59(e) and triggers the requirements of Fed. R. App. P. 4(a)(4) when it involves "reconsideration of matters properly encompassed in a decision on the merits") (quoting *White v. New Hampshire Dep't of Employment Security,* 455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982)); *Martinez v. Sullivan,* 874 F.2d 751, 753 (10th Cir. 1989).

Judgment on Firstier's Rule 52(b) and/or 59(e) motions was not entered until March 3, 1989 when the trial court rendered formal judgment and issued separate findings of fact and conclusions of law. The March 3, 1989 Order and Judgment and separate Memorandum Opinion and Order reaffirmed the earlier interlocutory oral announcement, thereby implicitly overruling the tolling motions. *See Director of Revenue, State of Colorado v. United States,* 392 F.2d 307, 310 (10th Cir. 1968); *Agostino v. Ellamar Packing Co.,* 191 F.2d 576, 577 (9th Cir. 1951). Consequently, Rule 4(a)(2) cannot save the premature notice of appeal and Rule 4(a)(4) renders it a nullity. Therefore, the Court of Appeals properly dismissed this appeal for want of jurisdiction.

CONCLUSION

The Court of Appeals properly dismissed this appeal for want of jurisdiction and the Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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-and-

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PROOF OF SERVICE

This is to certify that on the 25th day of January, 1990, three copies of this Brief for Respondent in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were deposited in the United States mail, with first class postage prepaid, addressed to:

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ACKNOWLEDGMENT

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 25th day of January, 1990.

Notary Public

My Commission Expires:
June 18, 1993
(SEAL)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

[Filed February 13, 1989]

OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Firstier Mortgage Co., a/k/a Realbanc, Inc. ("Firstier"), objects to the suggested findings of fact and conclusions of law submitted by Defendant, Investors Mortgage Insurance Co., ("IMI") who numbers are indicated herein,[1] for the following reasons:

1. Although Plaintiff denies it, the Court found:[2]

---

[1] The paragraph numbers in Firstier's objection correspond to the paragraph numbers of the factual contentions and legal conclusions to which the objections are directed.

[2] Quotations from Transcript of Judge's Order before the Honorable Luther L. Bohanon, United States District Judge, on oral argument on January 26, 1989 on

"There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay for these properties.

"I find no justification for dropping the appraised value from $94,000 down to where they did."

Transcript, page 2, lines 8 through 13.

* * * *

"I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

"The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to make the deal. I think that's the only reason it was done."

Transcript, page 3, lines 18 through 24.

* * * *

"MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

"Is it the Court's ruling — I'm not arguing with the Court at all — that that was a bad faith of Firstier or dishonesty in the mind of Firstier?

"THE COURT: Well, it would be the bad faith of Firstier.

Defendant's Motion For Summary Judgment ("Transcript").

"MR. DAWSON: Okay.

"THE COURT: And the bad faith of the borrower, both of them. They worked together."

Transcript, page 4, lines 2 through 12.

* * * *

2. Finding No. 2 says that "Firstier applied to IMI for private mortgage insurance coverage on each of the eight mortgage loans." Firstier did not submit an application for the mortgage insurance. Firstier merely sent its entire loan files for each of the eight mortgage loans to IMI for IMI's independent underwriting review pursuant to IMI's "risk partnership" with Firstier. See Firstier's Factual Contentions Nos. 4, 5, 6, 7, 11 and 20, Firstier's Response to Defendant's Motion For Summary Judgment filed October 17, 1988. ("Firstier's First Response.")

4. Firstier submitted its entire loan package to IMI. The documentation in the loan package did not comprise an "insurance application package." That term is the invention of counsel for the Defendant. It was never used by the parties. Firstier also objects to IMI's Suggested Finding No. 4 because it fails to describe all of the documentation which Firstier sent to IMI. See Firstier's Factual Contentions Nos. 4, 5, 6, 7 and 11, Firstier's First Response.

7. The representation of Firstier in the Affidavit of Purchaser and Vendor is: "Lender by execution hereof represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (emphasis supplied.) The Affidavits of Purchaser and Vendor state that the total purchase price for each property is $94,000.00, that the cash equity equals $18,800.00,

and that the first mortgage amount is $75,200.00. In the Affidavits, the vendor states, inter alia: "that certain of the prepaid expenses involved in the transaction (i.e., interest charges, real estate taxes, hazard insurance premiums, and private mortgage insurance renewal premiums) have not been paid by the vendor on behalf of the property purchaser." In the Affidavits, the Purchaser and Vendor acknowledge the inducement purpose of the Affidavit as set forth on the Affidavit. Exhibit 5, and Factual Contention No. 6(a), Firstier's First Response.

8. IMI's Proposed Finding No. 8 erroneously states that each of the Settlement Statements was signed by the settlement agent. The settlement agent did not sign the Settlement Statement for the Charles O. and Mary Anne Wolfes' loan. Exhibit W to IMI's Motion For Summary Judgment. Bill Tucker made the down payments for the borrowers at the various closings *as their realtor*, not as seller of the properties. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Supplemental Brief in Opposition to Defendant's Motion For Summary Judgment (Firstier's Third Response), paragraphs 6 and 7, pages 2 and 3.) There is evidence that Charles O. and Mary Anne Wolfes and Parke H. and Glenda A. Largent made earnest money deposits and down payments in connection with the purchases of three of the properties. (Firstier's First Response, Factual Contentions Nos. 25 and 26.)

9. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check conclusively establishes that the Staats did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature

of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 27.)

10. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. Larry Busking did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 28.)

11. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. Don Armstrong did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 29.)

12. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Keith H. and Paula K. Busking did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 30.)

13. Firstier objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Parke H. and Glenda A.

Largent did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 26.)

14. The Largents' loan application says that the source of their down payment was "Sale of Duplex *& Bank Accounts.*" The Largents made earnest money deposits for both properties in the total amount of $10,000.00. They had $17,000.00 in cash as a source of the down payment for the purchase of the properties. The sale of the duplex simply did not go through because the buyer did not have enough money. The sale was not a sham. (Firstier's First Response, Factual Contention No. 26.)

15. Charles O. Wolfes testified that he *did* make his down payment. (Firstier's First Response, Factual Contention No. 25.) Plaintiff objects insofar as said finding recites that Mr. Tucker's cancelled check "conclusively establishes" that Mr. and Mrs. Wolfes did not make a down payment. The source of funds brought to a loan closing does not always indicate the nature of the funds. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 and 7, pages 2 and 3. See Firstier's First Response, Factual Contention No. 25.)

16. Firstier objects insofar as suggested finding No. 16 asks the Court to find that none of the borrowers had cash equity in the properties and that none of the borrowers made down payments

or had personal funds at risk on any of the eight loans. (Firstier's First Response, Factual Contentions Nos. 25, 26, 27, 28, 29 and 30.)

17. Firstier did not "induce" IMI to insure the subject loans. Firstier merely sent IMI its entire loan file for IMI's *independent* underwriting review. See Firstier's First Response, Factual Contentions Nos. 4 and 5. Firstier *never* represented that the total purchase price for each property was $94,000.00, that the mortgage amount was $75,200.00, and that the loan-to-value ratio was 80%, and that each borrower had a cash equity in the respective properties equal to 20% of the purchase price. Those statements were representations of the buyer and seller. Firstier merely told IMI that the buyers' and sellers' statements "are true and correct *to the best of its knowledge.*" This Affidavit was prepared by IMI. (Firstier's First Response, Factual Contention No. 6.)

The true loan-to-value ratio was *not* 100%. Loan-to-value ratio, in the real estate mortgage industry, is not determined by the *purchase* price of the mortgaged property. Loan-to-value ratio is based on the *appraised* value of the property securing the real estate mortgage. Comparing the loan amounts with the appraised values of each of the properties at the time these loans were made results in a loan-to-value ratio of 80%. (Affidavit of Kenneth E. McBride, paragraph 9, pages 3 and 4, Exhibit A to Firstier's Third Response.)

18. All of the loans had an 80% loan-to-value ratio. The properties were appraised at $94,000.00. Each loan was in the original principal amount of $75,500.00. (Firstier's First Response, Factual Contention No. 15; Affidavit of Kenneth

E. McBride, Exhibit A to Firstier's Third Response, paragraph 9 at pages 3 and 4.) The sales price, appraised value and loan-to-value ratio were merely identifying or "designating" items of information on the face of the Commitment/Policies. This identifying information is not part of Firstier's representations to IMI. Firstier's representations are set out separately at the bottom of each Commitment/Policy. (Commitment/Policies, Exhibit B to IMI's Motion For Summary Judgment.)

19. American-First was not Firstier's agent. The realtors selected American-First to close the property purchases. Firstier merely used American-First as a stakeholder. [Firstier's First Response, Factual Contention No. 13; Affidavit of Kenneth E. McBride, paragraph 10, page 4, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, paragraph 4, Exhibit A to Response to Defendant's Reply to Firstier's Response to Defendant's Motion For Summary Judgment filed on November 17, 1988 ("Firstier's Second Response")].

20. We do not know what Ms. Lowery knew. Nobody ever took her deposition. There is nothing in the loan files, the Affidavit of Merleta Motley, and the checks attached to her Affidavit, which would indicate to a loan closer that there was anything irregular about the loans. The source of funds brought to a loan closing does not always indicate the nature of the funds. For example, a realtor may bring money to the closing that represents funds that the buyer/borrower placed with the realtor. In these loans, Bill Tucker acted both as seller and as realtor. (Affidavit of Kenneth E. McBride, paragraph 6, page 2,

Exhibit A to Firstier's Third Response.) The fact that Mr. Tucker, acting as realtor, brought some checks to the closing does not establish that Mr. Tucker, as seller, made down payments on behalf of the borrowers. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response, paragraphs 6 through 8, pages 2 and 3.)

21. These were negative amortization loans. The Notes sent to IMI provided that the total indebtedness could increase to 125% of the original principal amount. (Factual Contention No. 16, Firstier's First Response.) The mortgages stated total indebtedness of $94,000.00, which was the *cap* that was placed upon the negative amortization mortgage loan. IMI's underwriters were familiar with the concept of "negative amortization loans." In a negative amortization loan, the amount of indebtedness on the loan continues to increase during the negative amortization period of the loan, typically during the first few years of the loan. Unless the property securing the loan appreciates during the negative amortization period, the borrower's equity in the property would probably be eliminated or reduced as the indebtedness on the loan increases. (Firstier's First Response, Factual Contention No. 21; Affidavit of Mac Martin, paragraph 7, page 3, Exhibit 8 to Firstier's First Response.)

22. When these loans were made, IMI's underwriters made decisions to insure mortgage loans based in part on the expectation that property values in Oklahoma would continue to increase. (Affidavit of Mac Martin, paragraph 6, page 3, Exhibit 8 to Firstier's First Response; Firstier's

First Response, Factual Contentions Nos. 15, 16, 17, 18, 21 and 22.) There were no "insurance applications."

23. See Firstier's objections to IMI's Suggested Findings Nos. 21 and 22.

24. IMI's private investigators concluded that some of the borrowers had made down payments and some of them had not. Parke and Glenda Largent did not tell the investigators that they did not make a down payment. Charles O. Wolfes told the investigators that he *did* make a down payment, so the investigators decided that coverage should be denied because the indebtedness described on the mortgage was $94,000.00. IMI later withdrew this basis for denial of coverage on Mr. Wolfes' mortgage, and now asserts that coverage should be denied because Mr. Wolfes did not make a down payment. But, he did make a down payment. When some of the borrowers told the investigators that the purchases of the duplexes were straight up deals, and that they did make the down payments, the investigators became rude and pushy. (Firstier's First Response, Factual Contention No. 3, 21, 25 and 26.)

25. See Firstier's Objection to IMI's Suggested Finding No. 24.

26. IMI did not submit "application" forms for Firstier to sign and submit. It had insurance application forms which it could have required Firstier to fill out and submit. Instead, IMI chose to "share the risk" of loss with Firstier. (Firstier's First Response, Factual Contention Nos. 4 and 11; Affidavit of Mac Martin, paragraphs 3 and 5, Exhibit 8 to Firstier's First Response.) In 1982, IMI's underwriters did not always rely solely on infor-

mation supplied by lenders. IMI also relied on its underwriters' knowledge of the local market and its hope that property values in Oklahoma would continue to increase. (Affidavit of Mac Martin, paragraphs 4 and 6, Exhibit 8 to Firstier's First Response.)

27. The Commitment/Policy in effect in 1983 defines representations of the insured lender. Page 2 of the Commitment/Policy "Terms and Conditions" says at paragraph 19(a), entitled "MODIFICATION", that the policy shall not be modified or amended in any way except in writing signed by an authorized officer of the company. All of Firstier's representations, as defined in IMI's Commitment/Policy, were true. See Firstier's First Response, Factual Contention Nos. 9 and 10.

28. IMI had its own underwriters in 1982 and 1983. IMI's underwriters were charged with the responsibility to independently decide whether to insure the lender against losses sustained by reason of a borrower's default on a lender's mortgage loan. IMI's underwriters were required to make their own independent determination to "share the risk" with the lender, primarily by deciding whether the borrower could repay the loan, and whether the value of the mortgaged property appraisal would support the loan. (Firstier's First Response, Factual Contention Nos. 7 and 8; Affidavit of Mac Martin, paragraph 3, Exhibit 8 to Firstier's First Response.)

29. See Response to Suggested Finding No. 28. Firstier followed IMI's instructions exactly. The Affidavits were signed and the other verifications were acceptable.

30. In 1982 and 1983, when these loans were made, IMI promised Firstier that negative spot check review findings would *in no way affect the validity* of the commitment or policy of insurance. Instead, adverse information gathered during the spot check review would be used by IMI to help the lender in providing consistent and reliable information for insurance underwriting. In 1982 and 1983, IMI never cancelled coverage on its mortgage guaranty insurance policies based on negative spot check reviews. It was not until 1986 that IMI decided to change this policy. (Firstier's First Response, Factual Contention Nos. 18, 19 and 22.)

RESPONSE TO CONCLUSION OF LAW

1. Title 36, Section 3609 is not available to mortgage guaranty insurers. See Plaintiff's Limited Response Brief to Defendant's Motion For Summary Judgment (Plaintiff's First Limited Response) filed May 2, 1988; Plaintiff's Response to Defendant's Response to Plaintiff's Limited Response to Defendant's Motion for Summary Judgment ("Plaintiff's Second Limited Response") filed June 17, 1988.

2. IMI knew the difference between a loan file and an insurance application. It had insurance applications which it could have required Firstier to fill out and submit. Instead, it chose to rely on Firstier's loan file when it entered its "risk partnership" with Firstier. (Firstier's first Response, Factual Contention Nos. 4, 5 and 11.) There is no evidence of any "negotiations" as the Court thought might possibly have occurred (Order of the Court dated September 15, 1988). IMI's own policies rule out the possibility that any

oral statements or representations would have any force or effect. (Firstier's First Response, Factual Contention Nos. 5 and 9.)

3. IMI wrote these insurance policies. The policies are IMI's contractual agreement with Firstier. 36 O.S. 1981 §3613. In the policies, IMI agreed that Firstier only made five representations in connection with the policies. (Exhibit 4 to Firstier's First Response; page 3 of Firstier's Brief in Support of its First Response.) *Now,* IMI has changed its contractual definitions of representations of the lenders to include statements of the borrowers. (Firstier's First Response, Factual Contention No. 12.) But that was not the definition of lenders' representations which IMI used in 1982 and 1983. Representations of the borrowers were not representations of Firstier when these loans were made.

5. The Affidavits of Purchaser and Vendor contain numerous representations of the Purchaser and Vendor. Then, at the bottom of the Affidavit, the lenders' representation is defined: "Lender by execution hereof represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (emphasis supplied.) This representation was absolutely true. Neither Firstier nor American-First knew that the purchasers' and vendors' representations were false. (Affidavit of Robert Gondering, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response.) There were no misrepresentations within the meeting of 36 O.S. §3609.

6. The Commitment/Policy defines the representations of the insured lender. (Exhibit 5 to

Firstier's First Response.) All of these representations of Firstier were absolutely true. (Firstier's First Response, Factual Contention Nos. 9 and 10.) All of Firstier's representations in connection with these loan applications were made in good faith and are mere expressions of opinion, or "subjective representations" which were true. Since Firstier's statements were made in good faith, they were true. *United Benefits Life Insurance Company v. Knapp,* 51 P.2d 963 (Okla. 1935).

7. Even assuming 80% loan-to-value was a material term to the policy, IMI waived literal compliance with the term. Before IMI ever committed to issue the eight mortgage insurance policies, Firstier provided IMI with copies of all of the promissory notes. The promissory notes say that the total indebtedness on the loans could increase to 125% of the original principal amount. At the time that IMI issued the mortgage insurance policies, it knew that the loan-to-value ratio could exceed 100%. It waived literal compliance with the 80% loan-to-value term of the Commitment/Policy. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.,* 617 F.2d 196, at 199. (10th Cir., W. D. of Okla. 1980); *Federal Deposit Insurance Corporation v. Palermo,* 815 F.2d 1329, 1338, (10th Cir. 1987); *Indian Territory Operating Co. v. Bridger Petroleum Corp.,* 500 F.Supp. 449, 451 (W.D. of Okla. 1980).

IMI prepared and sent its operations manual to its lenders. The manual said that faulty appraisals, bad credit reports and other negative review findings would in no way affect the lenders' coverage. In 1982 and 1983, IMI had *never* cancelled its insurance policies based on negative review findings. After IMI issued these poli-

cies, Defendant changed its program. But by its own written directions and conduct, IMI waived literal compliance with its underwriting guidelines regarding property values and the creditworthiness of the borrowers.

8. The Court also found Firstier to be guilty of "bad faith" in submitting this application. The borrowers on three of the loans did make down payments and had cash equity in the properties. If any of the borrowers perpetrated a fraud, it was Firstier who was defrauded. The borrowers did not perpetrate their fraud on behalf of Firstier.

9. American-First was not Firstier's agent. In connection with closing the eight mortgage loans, American First was a mere stakeholder. Firstier did not delegate any authority to alter the terms of the loans, or otherwise, to American First. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, Exhibit B to Firstier's Third Response.)

10. "It is axiomatic that the existence of agency cannot be presumed. The party who relies upon the existence of the relationship is required both to allege and prove the fact of agency and the scope of the agent's authority." *Sturm v. Green,* 398 P.2d 799, 804 (Okla. 1965). IMI has the burden to allege facts essential to establish the existence of the agency relationship and the nature and extent thereof. *Keel v. Titan Construction Corp.,* 639 P.2d 1228, 1230 (Okla. 1981). In this case, the documentation shows that American First acted as agent for the buyer and the seller. The abstract company's fees were paid by the buyer and seller.

(Settlement Statements, Exhibit 11 to Firstier's First Response.) American-First got its authority to make expenditures and disbursements at closing from the buyers and the sellers. (Receipt and acknowledgement of settlement statement, Exhibit 11 to Firstier's First Response.) Firstier did not give American-First *any* authority. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response; Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response; Affidavit of Robert Gondring, Exhibit B to Firstier's Third Response.)

There is no evidence that American-First knew that any of the information supplied at the loan closings was false. (Affidavit of Kenneth E. McBride, Exhibit A to Firstier's Third Response.) Even if American-First had known that the borrowers and sellers were supplying false information, such knowledge would not be imputable to Firstier. Had Firstier known that any of the borrowers' statements were not true, Firstier would not have made the eight mortgage loans. (Affidavit of Robert Gondring, Exhibit A to Firstier's Second Response.) If American-First knew that the buyers and sellers made misrepresentations in connection with the mortgage loans and closed the loans anyway, then American First was acting adversely to Firstier's interest. Knowledge of an agent acting adversely to the interest of his principal is not imputable to the principal. *Inryco, Inc. v. CGR Building Systems,* 780 F.2d 879, 883 (10th Cir. 1986); *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (10th Cir. 1936). The knowledge of American-First, if

any, that the buyers and sellers made misrepresentations, if any, in connection with the eight mortgage loans is not imputable to Firstier.

11. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (10th Cir. 1983); *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

12. The cases recited in IMI's Suggested Conclusion of Law No. 12 may correctly recite the law of other jurisdictions. But that is not the law in Oklahoma. This Court must follow Oklahoma law. Under Oklahoma law, a "subjective representation" is a mere expression of opinion where the insured has no direct means of knowledge of the subject matter of the opinion. So long as the insured accurately states his opinion, there is no misrepresentation within the meaning of 36 O.S. (1981) §3609.

13. See Firstier's Response to IMI's Suggested Conclusions of Law Nos. 11 and 12.

14. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. 1981 §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, supra.; *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

13. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) merely said that, in ruling on defendant's motion for summary judgment in a libel action brought by a public figure, courts must apply the "clear and convincing" standard to decide whether plaintiff has produced sufficient evidence to establish that defendant acted with actual malice. However, the Court made it clear that application of this standard does not denigrate the jury's role:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whatever he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor".

Firstier submitted evidence that the down payments were made on at least three of the loans. (Firstier's Factual Contentions Nos. 25 and 26 to Firstier's Response to IMI's Motion For Summary Judgment.) The borrowers' statements that they *did* make the down payments directly controvert IMI's contentions to the contrary. They are to be "believed."

Firstier also submitted evidence that American-First was not Firstier's agent, but merely a stakeholder with *no* authority from Firstier. (Affidavit of Robert Gondring, Exhibit "A" to Firstier's Second Response.) Had Firstier known that any of the borrowers misrepresented the facts, it would not have made the loans. (*Id.*) These statements are to be "believed." *Liberty Lobby*, supra. A jury could reasonably conclude that if American-First closed the loans knowing that the borrowers misrepresented the facts, it acted adversely to Firstier in doing so, and its knowledge of any misrepresentations would not be imputable to Firstier. IMI is not entitled to summary judgement.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on this 13th day of February, 1989, a true and correct copy of the above and foregoing OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSION OF LAW was mailed, postage prepaid to:

John P. Roberts, Esq.
Eric S. Gray, Esq.
Edwards, Roberts & Propester
Suite 2900, First Oklahoma Tower
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

[Filed February 13, 1989]

FIRSTIER'S SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. In January 1983, Firstier financed eight first mortgage loans on eight duplexes located in Elk City, Beckham County, Oklahoma. Firstier sent its eight mortgage loan files to IMI for IMI's independent underwriting review. [Deposition of Darlene Dawson, pages 56-60, 170-171, Exhibit 29 to Plaintiff's Response to Defendant's Motion For Summary Judgment filed October 17, 1988. ("Firstier's First Response".)] IMI had insurance applications which it could have required Firstier to fill out and submit. (Deposition of Joel H. Pasternak, page 25, Exhibit 30 to Firstier's First Response.) IMI never provided "application" forms for Firstier to sign and submit.

2. There is no evidence of any "negotiations" as the Court thought might possibly have occurred. Order of the Court dated September 15, 1988.

3. The only documents submitted to IMI which were signed by Firstier are:

(a) The Affidavit of Purchaser and Vendor, which says: "Lender, by execution hereby, represents that the aforementioned statements are true and correct *to the best of its knowledge.*" (Emphasis added.) (Exhibit 5 to Firstier's First Response.)

(b) The confirmations of loan transaction. (Exhibit 6 to Firstier's First Response.)

(c) The loan applications, which are signed by the loan officer to show how the information was gathered. (Exhibit 7 to Firstier's First Response.)

(d) The policies in question. (Exhibit 4 to Firstier's First Response.)

4. The remaining documentation sent to IMI by Firstier was prepared or signed by third parties, such as the borrower, the appraiser, credit bureaus, the borrower's banker, the borrower's employer and tenants who leased the mortgage property. (IMI's Underwriting Guidelines, Exhibit 17 to Firstier's First Response.) Defendant has submitted no evidence that plaintiff had any control over these people or any knowledge of any false statement. Firstier had no such control or knowledge.

5. When IMI receives loan packages from its lenders, it conducts its own independent review of the documents. In 1982 and 1983, IMI did not

rely solely on information supplied by the lenders. (Deposition of Joel H. Pasternak, pages 140-142, Exhibit 30 to Firstier's First Response; Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.)

6. After approval of the lender's loan file, IMI prepares a Commitment/Policy and sends it to the lender for signature. The Commitment/Policy in effect in 1983 defines representations of the insured lender. (Exhibit 4 to Firstier's First Response.) All of Firstier's representations as defined in the Commitment/Policy were true. (Deposition of Joel H. Pasternak, pages 55-59, Exhibit 30 to Firstier's First Response.)

7. All of these loans were closed at the offices of American-First Abstract Company ("American-First"). It is a common practice in the real estate mortgage business for a realtor to bring money to a real estate mortgage loan closing which represents funds that the buyer/borrower placed with the realtor. In these loans, Bill Tucker acted both as seller and as realtor. The fact that Mr. Tucker brought some checks to the loan closing does not prove that the borrowers made no down payments. [Affidavit of Kenneth E. McBride, Exhibit A to Plaintiff's Supplemental Brief in Opposition to Defendant's Motion For Summary Judgment ("Firstier's Third Response")].

8. There is nothing in the loan files, the Affidavit of Merleta Motley, and the checks attached to her Affidavit, which would indicate to a loan closer that there was anything irregular about the real estate mortgage loans. (*Id.*)

9. American-First did not know that the buyers were not making their down payments.

American-First does not close loans if it has any reason to believe the parties are not complying with the terms of the real estate purchase contract or the loan documents. There is nothing in the American-First loan files, the Affidavit of Merleta Motley and the checks attached thereto, which would tell a loan closer that the buyers were not making their down payments. (*Id.*)

10. American-First understands loan-to-value ratio to be based on the appraised value of the property securing the real estate mortgage, not the sales price. American-First has copies of appraisal reports for all of the properties which secured the mortgages and loans and which are the subject matter of this litigation. In each of American-First's files on these loans, the documentation indicates that the loan-to-value ratio is 80%. (*Id.*)

11. When American-First closes a loan, it merely acts as a stakeholder. It receives and disburses money in accordance with the buyers' and sellers' instructions. Insofar as the lender is concerned, American-First is strictly a stakeholder, not authorized to bind the lender to anything. American-First is never authorized to, nor would it, change the terms of the loan or the purchase contract. (*Id.*)

12. The realtor selected American-First to close the purchase. (Deposition of Darlene Dawson, pages 49-51, Exhibit 29 to Firstier's First Response.) Firstier just expected its check to be delivered as instructed. It did not control how American First should reach that result. (Deposition of Robert Gondring, page 83, Exhibit 27 to Firstier's First Response.)

13. All of the loans had an 80% loan-to-value ratio. The properties were appraised at $94,000.00. (Appraisal Reports of Jim Artman, Exhibit 14 to Firstier's First Response.) Each loan was in the original principal amount of $75,500.00. (Promissory Notes, Exhibit 15 to Firstier's First Response.)

14. All of the loans were negative amortization loans. The notes sent to IMI provided that the total indebtedness could increase to 125% of the original principal amount. (Promissory Notes, Exhibit 15 to Firstier's First Response.)

15. IMI instructed Firstier how to document the source of the borrower's down payments by having the buyer and seller sign the Affidavits of Purchaser and Vendor. No other instructions about how to document the source of down payments were ever given to Firstier. Firstier followed IMI's instructions. (Deposition of Joel H. Pasternak, pages 130-131.)

16. After the insurance policy was issued, sometimes IMI would conduct its own independent after-the-fact review of loan submissions received from the lenders. IMI's own written underwriting review procedures say:

> "Negative review findings *in no way affect the validity* of the Commitment or Policy of insurance which has been issued. However, frequent and significant variations between original and spot-check reports from a lender will cause IMI to contact the lender to determine the cause of the discrepancies, beginning with more frequent spot-checks to help identify the problem. All necessary steps will be taken to assist such a lender in providing consistent and reliable information for insurance under-

writing." (Emphasis supplied.) (IMI's Operations Manual "Section VI, Underwriting Review," page 33, paragraph 3, Exhibit 3 to Firstier's First Response.)

17. When IMI issued the eight mortgage guaranty insurance policies, it entered into a "risk partnership" relationship with Firstier. (Exhibit 3 to Firstier's First Response, page 36, paragraph 4.) When IMI issued the eight mortgage guaranty insurance policies which are the subject matter of this lawsuit, it was relying on the hope that these properties' values would continue to increase. (Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.)

18. In 1982 and 1983, IMI *never* cancelled coverage on its mortgage guaranty insurance policies based on negative spot-check reviews. (Affidavit of Mac Martin, Exhibit 8 to Firstier's First Response.) It was not until 1986 that IMI decided to change this policy. (Deposition of Steven Platten, pages 22 and 23.)

19. IMI's underwriting guidelines are contained in Section II, pages 14-22 of the operations manual. (Exhibit 17 to Plaintiff's First Response.) The underwriting guidelines do not require the lender to question or doubt the purchaser or vendor who signed the Affidavit supplied by IMI. (*Id.*) IMI never gave its lenders written instructions to cross examine the Affidavits of Purchaser and Vendor. (Deposition of Joel H. Pasternak, pages 139 and 140, Exhibit 30 to Firstier's First Response.) Instead, IMI merely required its lenders to sign a statement which says:

> "Lender, by execution hereby, represents that the aforementioned statements are true and

> correct *to the best of its knowledge.*" (Emphasis supplied.) (Exhibit 5 to Plaintiff's First Response.)

That is the only representation made by Firstier with respect to the facts contained in the Affidavits of Purchaser and Vendor. There is no evidence that Firstier knew that any of the purchasers' and vendors' statements were false.

A. THE BORROWERS

Charles O. Wolfes.

20. Charles O. Wolfes bought the duplex at 111 Cripple Creek for an investment. (Deposition of Charles O. Wolfes, pages 75 through 77, Exhibit 32 to Firstier's First Response.) Mr. Wolfes closed his loan with Firstier and a loan with Pool Mortgage on a duplex next door to 111 Cripple Creek on the same day. (Deposition of Charles O. Wolfes pages 48-49, Exhibit 32 to Firstier's First Response.) Both closings took place at American-First. (Deposition of Charles O. Wolfes, pages 51-54, Exhibit 32 to Firstier's First Response.) Mr. Wolfes paid a total of approximately $19,000.00 as a down payment on the two properties to American-First with a cashier's check. (Id.) Pool Mortgage Company loaned Mr. Wolfes $89,300.00 for the purchase of the duplex next door to 111 Cripple Creek. (Deposition of Charles O. Wolfes, pages 93, 94, Exhibit 32 to Firstier's First Response.)

21. Prior to the closing, the cash in Mr. Wolfes' depositories was not sufficient to make the $19,000.00 down payment. (Deposition of Charles O. Wolfes, pages 55-58, Exhibit 32 to Firstier's First Response; loan application of Charles O.

Wolfes, Exhibit 7 to Firstier's First Response.) At Firstier's request, Mr. Wolfes provided Firstier with a hand-written note that said that he was not borrowing the funds for the down payment. (Deposition of Charles O. Wolfes, page 25, Exhibit 32 to Firstier's First Response; Defendant's Exhibit 28 to Deposition of Charles O. Wolfes, Exhibit 19 to Firstier's First Response.)

22. In addition to the down payment, Mr. Wolfes put a lot of money into the duplex for repairs and improvements. When the rents on the duplexes went down, Mr.Wolfes kept making the payments to cover the rental shortfall. (Deposition of Charles O. Wolfes, pages 26; 63-67, Exhibit 32 to Firstier's First Response; Defendant's Exhibits 29 and 30 to Deposition of Charles O. Wolfes, Exhibit 23 to Firstier's First Response.) Mr. Wolfes maintained an account in Elk City and a manager who handled all of his properties. He kept a ledger of payments to the mortgagee. (Deposition of Charles O. Wolfes, pages 19-21, Exhibit 32 to Firstier's First Response.)

23. In 1982, Mr. Wolfes was actively developing property in Elk City because the market was very strong. He wanted to buy more property than he actually purchased, but all of the property was sold. (Deposition of Charles O. Wolfes, pages 32-33; 39-41, Exhibit 32 to Firstier's First Response.)

24. After Firstier made its claim to IMI for coverage on Mr. Wolfes' mortgage, IMI sent its investigators to Mr. Wolfes' office and to his home. (Deposition of Charles O. Wolfes, pages 85-86, Exhibit 32 to Firstier's First Response.) The investigators told Mr. Wolfes this was a kickback deal. (Deposition of Charles O. Wolfes, pages 79

and 80, Exhibit 32 to Firstier's First Response.) When Mr. Wolfes told the investigators that his loan was not a kickback deal, they became "hard" and "pushy". (Deposition of Charles O. Wolfes, pages 85-86, Exhibit 32 to Firstier's First Response.) The experience was unpleasant. (*Id.*)

Parke and Glenda Largent.

25. The Largents' loan application says that the source of their down payment was "Sale of Duplex & Bank Accounts." (Loan Application of Parke and Glenda Largent, Exhibit 7 to Firstier's First Response.) The Largents made earnest money deposits for both properties in the total amount of $10,000.00. (Loan Application of Parke and Glenda Largent, Exhibit 7 to Firstier's First Response.) They had $17,000.00 in cash as a source of the down payment for the purchase of the properties. (Deposition of Parke Largent, page 28, Exhibit 33 to Firstier's First Response; Deposition of Glenda Largent, pages 46-48, Exhibit 34 to Firstier's First Response.) The sale of the duplex simply did not go through because the buyer did not have enough money. (Deposition of Glenda Largent, pages 62-63, 72-73, Exhibit 34 to Firstier's First Response.) The sale was not a sham. (Deposition of Glenda Largent, page 75, Exhibit 34 to Firstier's First Response.)

26. IMI's private investigators found out that some of the borrowers had made down payments and some of them had not. Parke and Glenda Largent did not tell investigators that they did not make a down payment. (Deposition of Parke Largent, page 47, Exhibit 33 to Firstier's First Response.)

Henry and Janice Staat.

27. Henry and Janice Staat were making real estate investments in the Elk City area when they purchased the duplex at 109 Cripple Creek Lane. (Deposition of Henry M. Staat, pages 26-28, Exhibit 35 to Firstier's First Response.) Prior to closing the loan on the duplex on 109 Cripple Creek, Mr. Staat went out and looked at the duplex. (Deposition of Henry M. Staat, pages 14, 29, Exhibit 35 to Firstier's First Response.)

28. At the closing, Mr. Staat signed an Affidavit of Purchaser and Vendor. (Deposition of Henry M. Staat, page 64, Exhibit 35 to Firstier's First Response; Defendant's Exhibit 6 to Deposition of Henry M. Staat, Exhibit 5 to Firstier's First Response.) The amount of the down payment was handwritten on the Affidavit of Purchaser and Vendor. Mr. Staat does not know whether the amount of the down payment was written on the Affidavit of Purchaser and Vendor when he signed it. (*Id.*)

29. Mr. Staat considered himself to be the owner of the duplex. If the property had sold at a profit, Mr. Staat would have gotten a profit. (Deposition of Henry M. Staat, pages 71-72, Exhibit 35 to Firstier's First Response.) When rental income from the properties began to decline, Mr. Staat started trying to sell both of his Elk City properties. (Deposition of Henry M. Staat, pages 73-74, 91-92, Exhibit 35 to Firstier's First Response.) He spent his own personal funds to repair the property, paid insurance on the property, brought the loan current through year-end 1984, and continued to maintain payments on the property through May 1986. (Deposition of Henry M. Staat, pages 92-93, Exhibit 35 to Firstier's First Response; Exhibit 26 to Firstier's First Response.)

Larry Busking.

30. Larry Busking understood that he would be personally liable to Firstier on the Promissory Note. He reported the duplex as a loss on his tax return. (Deposition of Larry E. Busking, page 76, Exhibit 36 to Firstier's First Response.)

Don Armstrong.

31. When Mr. Armstrong purchased the properties at 121 and 125 Cripple Creek Lane, he had substantial money in depositories and the financial ability to pay the loans. (Deposition of Don Armstrong, pages 41-42, Exhibit 38 to Firstier's First Response; Exhibit 7 to Firstier's First Response.) Mr. Armstrong knew that he was personally liable on the notes and mortgages that he gave to Firstier. (Deposition of Don Armstrong, pages 73; 129-130, Exhibit 38 to Firstier's First Response.)

32. When Mr. Armstrong bought the properties in Elk City, the economy in Elk City was booming. (Deposition of Don Armstrong, pages 99-100, Exhibit 38 to Firstier's First Response.) He described real estate in the Elk City area as "hot". (*Id.*) At the time Mr. Armstrong purchased the Cripple Creek properties, a lot of people were purchasing investment real estate in the Elk City area. Everyone expected the price of the real estate to increase. The investors were relying on an anticipated increase in the value of the real estate in making their investment decisions. (Deposition of Don Armstrong, pages 126-127, Exhibit 38 to Firstier's First Response.)

Keith Busking.

33. Keith Busking never attended a loan closing. Instead, Bill Tucker brought all of the closing documents to Mr. Busking's home for him to sign. (Deposition of Keith Busking, pages 26; 58-59, Exhibit 37 to Firstier's First Response.) After the loan went into default, Mr. Busking did, however, attempt to make the payments. (Deposition of Keith Busking, page 19, Exhibit 37 to Firstier's First Response.)

SUGGESTED CONCLUSIONS OF LAW

1. IMI knew the difference between a loan file and an insurance application. It had insurance applications which it could have required Firstier to fill out and submit. Instead, it chose to rely on Firstier's loan file when it entered into its "risk partnership" with Firstier. There was no "application" within the meaning of 36 O.S. 1981 §3609 in this case. The statute does not apply to this case.

2. There is no evidence of any "negotiations" as the Court thought might possibly have occurred. (Order of the Court dated September 15, 1988.) IMI's own policies rule out the possibilities that any oral statements or representations would have any force or effect. There were no "negotiations" in this case within the contemplation of 36 O.S. 1981 §3609. The statute does not apply to this case.

3. IMI wrote these insurance policies. The policies are IMI's contractual agreement with Firstier. 36 O.S. 1981 §3616. In the policies, IMI agreed that Firstier only made five representations in connection with the policies. Representations of the borrowers were not representations of Firstier when these loans were made.

4. The Affidavits of purchaser and vendor contained numerous representations of the Purchaser and the Vendor. Then, at the bottom of the Affidavit, the lender's representation is defined: "Lender, by execution hereof, represents that the aforementioned statements are true and correct to the best of its knowledge." This representation was absolutely true. Neither Firstier nor American-First knew that the purchasers' and vendors' representations were false. There were no misrepresentations within the meaning of 36 O.S. 1981 §3609.

5. The Commitment/Policy defines the representations of the insured lender. All of Firstier's statements on the Commitment/Policy were true. All of Firstier's statements in connection with these loan applications were made in good faith and were mere expressions of opinion, or "subjective representations" which were true. Since Firstier's statements were made in good faith, they were true. *United Benefit Life Insurance Company v. Knapp*, 51 P.2d 963 (Okla. 1935).

6. Even assuming 80% loan-to-value ratio was a material term to the policy, IMI waived literal compliance with the term. Before IMI ever commited to issue the eight mortgage insurance policies, Firstier provided IMI with copies of all the Promissory Notes. The Promissory Notes say that the total indebtedness on the loans could increase to 120% of the original principal amount. At the time that IMI issued the mortgage insurance policies, it knew that the loan-to-value ratio could exceed 100%. It waived literal compliance with the 80% loan-to-value term of the Commitment/Policy. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, at 199 (10th Circuit

1980); *Federal Deposit Insurance Corporation v. Palermo,* 815 F.2d 1329, 1338 (10th Circuit 1987); *Indian Territory Operating Co. v. Bridger Petroleum Corp.,* 500 F.Supp. 449, 451 (W.D. of Okla. 1980).

7. IMI prepared and sent its Operations Manual to its lenders. The manual said that faulty appraisals, bad credit reports and other negative review findings would in no way affect the lender's coverage. In 1982 and 1983, IMI had never cancelled its insurance policies based on negative review findings. After IMI issued these policies, it changed its program. But by its own written directions and conduct, IMI waived literal compliance with its Underwriting Guidelines regarding property values and the creditworthiness of the borrowers.

8. The borrowers on three of the loans did make down payments and had cash equity in the properties. Some of the remaining borrowers put their own personal funds into the properties. If any of the borrowers perpetrated a fraud, it was Firstier who was defrauded. The borrowers did not perpetrate their fraud on behalf of Firstier.

9. American-First was not Firstier's agent. In connection with closing the eight mortgage loans, American-First was a mere stakeholder. Firstier did not delegate any authority to alter the terms of the loans, or otherwise, to American-First.

10. It is axiomatic that the existence of agency cannot be presumed. IMI, relying upon the existence of an agency relationship between American-First and Firstier, must both allege and prove the fact of agency and the scope of the agent's authority. *Keel v. Titan Construction*

Corp., 639 P.2d 1228, 1230 (Okla. 1981); *Sturm v. Green,* 398 P.2d 799, 804 (Okla. 1965). In this case, the documentation shows that American-First acted as agent for the buyer and the seller. The abstract company's fees were paid by the buyer and the seller. American-First got its authority to make expenditures and disbursements at closing from the buyers and sellers. Firstier did not give American-First any authority. American First was not Firstier's agent.

11. There is no evidence that American-First knew that any of the information supplied at the loan closings was false. Even if American First had known that the borrowers and sellers were supplying false information, such knowledge would not be imputable to Firstier. Had Firstier known that any of the borrowers' statements were not true, Firstier would not have made the eight mortgage loans. If American First knew that the buyers and sellers made misrepresentations in connection with the mortgage loans and closed the loans anyway, then American-First was acting adversely to Firstier's interest. Knowledge of an agent acting adversely to the interest of his ~~prin~~cipal is not imputable to the principal. *Inryco, Inc. v. CGR Building Systems,* 780 F.2d 879, 833 (10th Circuit 1986); *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.,* 83 F.2d 14 (10th Circuit 1936). The knowledge of American-First, if any, that the buyers and sellers made misrepresentations, if any, in connection with the eight mortgage loans is not imputable to Firstier.

12. The statements made by Firstier in connection with the eight mortgage loans are "subjective representations." They are mere statements of opinion, which are true. The subject of

Firstier's opinion was that all of the information in the loan file was correct. But the subject of the representation was merely the opinion of Firstier. Since Firstier truly believed that the information in its loan files was correct, it made no misrepresentations within the meaning of 36 O.S. 1981 §3609. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, supra.; *Brunson v. Mid-Western Life Insurance Co.*, 547 P.2d 970 (Okla. 1976); *Whitlatch v. John Hancock Mutual Life Insurance Co.*, 441 P.2d 956 (Okla. 1968); *Massachusetts Mutual Life Insurance Co. v. Allen*, 416 P.2d 935 (Okla. 1966); *United Benefit Life Insurance Co. v. Knapp*, 51 P.2d 963 (Okla. 1935).

13. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) merely said that, in ruling on defendant's motion for summary judgment in a libel action brought by a public figure, courts must apply the "clear and convincing" standard to decide whether plaintiff has produced sufficient evidence to establish that defendant acted with actual malice. However, the Court made it clear that application of this standard does not denigrate the jury's role:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whatever he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor".

Firstier submitted evidence that the down payments were made on at least three of the loans. (Firstier's Factual Contentions Nos. 25 and 26 to Firstier's Response to IMI's Motion For

Summary Judgment.) The borrowers' statements that they *did* make the down payments directly controvert IMI's contentions to the contrary. They are to be "believed."

Firstier also submitted evidence that American-First was not Firstier's agent, but merely a stakeholder with *no* authority from Firstier. (Affidavit of Robert Gondring, Exhibit "A" hereto.) Had Firstier known that any of the borrowers misrepresented the facts, it would not have made the loans. (*Id.*) These statements are to be "believed." *Liberty Lobby*, supra. A jury could reasonably conclude that if American-First closed the loans knowing that the borrowers misrepresented the facts, it acted adversely to Firstier in doing so, and its knowledge of any misrepresentations would not be imputable to Firstier. IMI is not entitled to summary judgment.

Respectfully submitted,

JANICE M. DANSBY and #2155
JACK S. DAWSON -of- #2235
MILLER, DOLLARHIDE, DAWSON & SHAW
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(405) 236-8541

Attorneys for Plaintiff

CERTIFICATE OF MAILING

This is to certify that on this 13th day of February, 1989, a true and correct copy of the above and foregoing OBJECTION TO DEFENDANT'S SUGGESTED FINDINGS OF FACT AND CONCLUSION OF LAW was mailed, postage prepaid to:

John P. Roberts, Esq.
Eric S. Gray, Esq.
Edwards, Roberts & Propester
Suite 2900, First Oklahoma Tower
Oklahoma City, OK 73102

Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

MILLER, DOLLARHIDE, DAWSON & SHAW
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Petition for Certiorari Filed December 26, 1989
Certiorari Granted February 26, 1990

TABLE OF CONTENTS

	Page(s)
Docket Entries 179-191, *FirsTier Mortgage Co., a/k/a Realbanc, Inc. v. Investors Mortgage Insurance Co.*	1
Amended Complaint dated April 17, 1987	4
Answer dated May 11, 1987	8
Transcipt of Hearing dated January 26, 1989	12
Defendant's Application for Award of Attorney's Fees and Supporting Brief dated February 10, 1989	30
Bill of Costs dated February 10, 1989	34
Defendant's Supplementary Application for Award of Attorney's Fees and Supporting Brief dated March 15, 1989	36
Notice of Appeal dated February 8, 1989	54
Application for Extension of Time to File Notice of Appeal dated April 14, 1989	55
Order dated April 24, 1989	57
Notice of Appeal dated April 25, 1989	58

The following docket entries, orders, letter and memorandum opinion have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Docket Entries 1-179 ..... F-1

Order and Judgment dated March 3, 1989 ..... D-1

Memorandum Opinion dated March 3, 1989 ..... E-1

Letter from the United States Court of Appeals for the Tenth Circuit dated April 5, 1989 ..... B-1

Order of the United States Court of Appeals for the Tenth Circuit filed September 26, 1989 ..... A-1

The following pleadings have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Brief for Respondent:

Objection to Defendant's Suggested Findings of Fact and Conclusions of Law A-1

FirsTier's suggested Findings of Fact and Conclusions of Law B-1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Plaintiff,

vs.

INVESTORS MORTGAGE CO.
Defendant.

CAUSE

28 USC 1332: breach of insurance contract – tort bad faith

ATTORNEYS

PLAINTIFF:
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405/236-8541

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ROBERTS, GRAY, GORESEN & MORIARTY
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405/235-0123 (1)

. . . .

(Docket Entries 1-178 omitted from this printing because they appear at pages F-2 through F-16 of the appendix to the Petition for Certiorari)

DATE	N.R.	PROCEEDINGS
04-24-89	179	ENTRY of Appearance by Gregory F. Pilcher, cnsl for dft -w/s (ap)
04-25-89	180	NOTICE of Appeal by Plf, FirsTier Mortgage Co. fm Ct's Ord & Judg & Memo Opinion ent 3-3-89 w/s -jda
04-25-89	181	CLERK'S ltr re: serv of notice of appeal, w/cpy ltr & dkt sht as Prelim record to CCA & cnsl -jda #89-6145
04-25-89	—	RECEIVED $105.00 filing & dkt fees on appeal. #79758 -jda
04-28-89	182	NOTICE of Appeal by Investors Mortgage Insurance Co fm ord ent 4-24-89 w/s -jda
04-28-89	—	RECEIVED $105.00 filing & dktg fees on appeal. #79845 -jda
05-01-89	183	CLERK'S ltr re: serv of Notice of appeal, w/cpy ltr & dkt sht as prelim record to CCA & cnsl -jda #89-6150
05-10-89	184	NOTICE of transc ord (Pilcher) (No TR necessary) cc: CCA & cnsl -sa
05-10-89	185	SUPERSEDEAS Bond in amt of $65,221.40 fm The St. Paul Fire & Marine Ins Co, as surety pndg appeal fm Ord ent 4-6-89 (BOHANON) (ap)
05-22-89	186	NOTICE of Transc ord form (Dawson, Dansby) (Mueck, C.S.R.) (E.C.D.- 7-22-89) -jda
06-14-89		TRANSCRIPT Of Hrg 1-26-89, Hilton, CSR, 1 vol, -sa
06-15-89	187	CLERK'S ltr to CCA & cnsl advise transc rec'd, 1 vol, Hilton, CSR -sa

DATE	N.R.	PROCEEDINGS
07-24-89	—	TRANSCRIPT of Proceed had on April 6, 1989, Muecke, CSR-1 vol -jda
07-25-89	188	CLERK'S ltr advising CCA & cnsl TR rec'd, 1 vol, Muecke, CSR -jda
09-29-89	189	CCA'S cert cpy of ord re consideration of an ord of the Ct challenging appellate juris; it is ord appeal in #89-6042 is dism for lack of juris; oral announce by D.C. on 1-26-89 was not a final decision w/i the mean of 28 U.S.C. S1291; mtn to dism file in #89-6145 is denied; (more fully set out) (Moore, Baldock, & Ebel) #89-6042 -sa
12-29-89	190	CCA'S ord record on appeal due 1-5-90 -eab
01-5-90	191	CLERK'S ltr transm record on appeal to CCA, 4 vol, w/cpy ltr & dkt sheet as index to cnsl -eab

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., A/K/A REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

AMENDED COMPLAINT

I. JURISDICTION — Diversity:

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, with its principal place of business in Omaha, Nebraska. Defendant is a corporation organized and existing under the laws of a state other than Nebraska, with its principal place of business in Boston, Massachusetts. Defendant is an insurance company, regulated by, and authorized to issue policies of insurance in, the State of Oklahoma. The amount in controversy, exclusive of costs and interest, exceeds the sum of $10,000.00.

II. CONTRACTUAL DUTY — Insurance Policies Issued:

In the late 1982 and early 1983 time-frame, Plaintiff made first mortgage real estate loans to various individuals in Beckham County, Oklahoma, including those listed below. To insure and secure itself against loss caused by reason of default by the borrowers in payment upon these loans, Plaintiff purchased policies of insurance from Defendant. Under the terms of these policies of insurance, Defendant promised to pay to Plaintiff certain percentages of

losses sustained by reason of the default by the borrower in payments upon the loans. The specific insurance policies and borrowers as of 10 March 87 are as follows:

Policy #	Name/Address
456987	Largent, Parke & Glenda 107 Cripple Creek Lane Elk City, Oklahoma
456988	Largent, Parke & Glenda 105 Cripple Creek Lane Elk City, Oklahoma
457066	Statt, Henry and Janice 109 Cripple Creek Lane Elk City, Oklahoma
457078	Busking, Larry E. 103 Cripple Creek Lane Elk City, Oklahoma
457225	Busking, Keith & Paula 123 Cripple Creek Lane Elk City, Oklahoma
457246	Armstrong, Don 125 Cripple Creek Lane Elk City, Oklahoma
457247	Armstrong, Don 121 Cripple Creek Lane Elk City, Oklahoma
457224	Wolfe, Charles 111 Cripple Creek Lane Elk City, Oklahoma

III. BREACH — Refusal to Pay Claims:

Plaintiff has suffered, and will continue to suffer, losses caused by reason of defaults by the borrowers in payments of the above-referenced loans. Plaintiff has made claim upon Defendant and has complied

with all conditions precedent not waived or excused by Defendant. Defendant unreasonably refuses to pay the claims or to honor the commitments of its insurance policies which it issued, and has stated its intention to not pay other claims when made.

IV. DAMAGES – Approximately $169,000.00 Plus:

As of March 10, 1987, Plaintiff had suffered damages of approximately $149,000.00. An additional $20,000.00 (approx.) has been suffered because of Defendant's breach on the Wolfe policy. These sums will continue to increase daily because of additional interest. Plaintiff's consequential damages have not yet been determined.

V. BAD FAITH – Punitive Damages:

Defendant owed Plaintiff the duties of good faith and fair dealing in the processing and payment of claims. Defendant has breached these duties by willfully, maliciously, intentionally and in bad faith refusing to pay Plaintiff's claims without just cause, thereby depriving Plaintiff of the security and protection for which it paid. Defendant has shown an attitude of indifference to, and reckless disregard of, the consequences of its breaches of duties to Plaintiff and Plaintiff's rights. Defendant should be punished by assessing punitive damages in an amount sufficient to make an example of Defendant and to insure that Defendant, and others similarly situated, do not repeat this conduct, and to punish the defendant for its past conduct.

VI. RELIEF – Money Judgment:

Plaintiff requests a money judgment against Defendant in the approximate amount of $169,000.00, continuing interest-related loss, interest, costs and attorney fees.

FIRSTIER MORTGAGE COMPANY

By _____

Jack S. Dawson #2235
Miller, Dollarhide, Dawson & Shaw
Attorneys for Plaintiff
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

JURY TRIAL DEMANDED
ATTORNEY'S LIEN CLAIMED

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANSWER

Dated May 11, 1987
(Caption Omitted in Printing)

COMES NOW the Defendant, Investors Mortgage Insurance Company, a/k/a Investors Mortgage Insurance Co., an Illinois corporation, and for its Answer to the Plaintiff's Amended Complaint filed herein on April 17, 1987, alleges and states as follows:

1. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 1 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant does not deny that Defendant is a corporation organized and existing under the laws of a state other than Nebraska, with its principal place of business in Boston, Masssachusetts, and that Defendant is an insurance company, regulated by, and authorized to issue policies of insurance in, the State of Oklahoma.

2. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 2 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant does not deny that the Defendant issued certain insurance policies in favor of the Realbanc, Inc. as the insured lender, which insurance policies and borrowers are generally described as follows:

Policy #	Name/Address
456987	Largent, Parke & Glenda 107 Cripple Creek Lane Elk City, Oklahoma

Policy #	Name/Address
456988	Largent, Parke & Glenda 105 Cripple Creek Lane Elk City, Oklahoma
457066	Statt, Henry and Janice 109 Cripple Creek Lane Elk City, Oklahoma
457078	Busking, Larry E. 103 Cripple Creek Lane Elk City, Oklahoma
457225	Busking, Keith & Paula 123 Cripple Creek Lane Elk City, Oklahoma
457246	Armstrong, Don 125 Cripple Creek Lane Elk City, Oklahoma
457247	Armstrong, Don 121 Cripple Creek Lane Elk City, Oklahoma
457224	Wolfe, Charles 111 Cripple Creek Lane Elk City, Oklahoma

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint.

4. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 4 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant specifically denies any alleged anticipatory breach of contract on the Wolfe and Statt policies.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant denies the allegations contained in paragraph 6 of the Amended Complaint.

AFFIRMATIVE DEFENSES

7. The Plaintiff's claims are barred by accord and satisfaction.

8. The Plaintiff's claims are barred and the Plaintiffs have suffered no damages as a result of its own contributory negligence.

9. The Plaintiff is estopped by its own failure to mitigate its alleged damages to seek recovery from the Defendant.

10. As a result of a total failure of consideration, the Defendant has no liability to the Plaintiff on the insurance policies in question.

11. That the mortgage loans which were insured by the said insurance policies were obtained by fraud and misrepresentations by the said borrowers, and as a result the Defendant has no liability to the Plaintiff on the insurance policies in question.

12. That because of illegality, the Defendant has no liability to the Plaintiff on the insurance policies in question.

13. That because of waiver, the Defendant has no liability to the Plaintiff on the insurance policies in question.

14. That because the Plaintiff did not comply with all the terms and provisions of the insurance policies in question, the Defendant has no liability to the Plaintiff on the insurance polices in question.

15. That the Plaintiff was negligent in underwriting the mortgage loans covered by said insurance policies, and any alleged damages sustained by Plaintiff were a direct result of the Plaintiff's own negligence.

16. That the Plaintiff owed the duty of good faith and fair dealing in submitting the mortgage loans to be insured by the Defendant, and any alleged damages sustained by the Plaintiff are a result of the breach of Plaintiff's own duty of good faith and fair dealing.

WHEREFORE, having fully answered the Defendant prays that the Plaintiff take nothing by this action, and that the Amended Complaint be dismissed with prejudice and that judgment be entered for the Defendant, and that the Defendant be awarded attorney's fees, costs, and such other relief as this Court may deem just and proper.

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(405) 842-1945

Attorneys for Defendant,
INVESTORS MORTGAGE
INSURANCE CO.

. . . .

(Certificate of Mailing Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LUTHER L. BOHANON
UNITED STATES DISTRICT JUDGE

Dated January 26, 1989
(Caption Omitted in Printing)

APPEARANCES:

For the Plaintiff: JACK DAWSON and
JANICE DANSBY
Attorneys at Law
Colcord Building
Oklahoma City, OK

For the Defendant: ERIC GRAY and
GREG PILCHER
Attorneys at Law
2900 First Oklahoma Tower
Oklahoma City, OK

Court Reporter: Lynn L. Hilton
3011-C U.S. Courthouse
Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: The Court has for consideration [p. 3] this morning the case of Firstier Mortgage versus Investors Mortgage Insurance Company.

Jack Dawson, you represent the Plaintiff?

MR. DAWSON: Yes, Your Honor.

THE COURT: Mr. Roberts?

MR. GRAY: Mr. Roberts is not here today, Your Honor. Eric Gray and Greg Pilcher here on behalf of Investors.

THE COURT: Do you have a motion?

MR. GRAY: Yes, Your Honor, it is my Motion for Summary Judgment.

THE COURT: Do you want to be heard on it?

MR. GRAY: Yes.

THE COURT: I might say that the file in this case has become very voluminous. The parties have filed and refiled and filed and refiled papers and mortgages and I have read everything. I can't say that I understand everything perfectly, but I think I understand the problem is whether or not the insurance issued by Investors Mortgage Insurance Company is insurance that carries liability or whether it does not. Is that the question?

MR. GRAY: Yes, basically, Your Honor, whether my client is liable under the policies or is exonerated from those policies based on an Oklahoma Statute under Title 36, [p. 4] Section 3609.

THE COURT: Was there eight policies issued?

MR. GRAY: Yes, eight policies.

THE COURT: All right. The Court will hear you on it.

MR. GRAY: I realize that there is a mountain of briefs in this case, Your Honor, but in essence it is a very simple case. Plaintiff is in the business of making loans; Defendant is in the business of insuring losses on default on those types of loans.

The premium on insurance of this type is based on the risk insured, obviously. In the present case, there were eight mortgage loans that were made on duplex properties in Elk City, Oklahoma.

All of the properties were owned by the same man, a man by the name of Bill Tucker. Mr. Tucker sought to sell those properties. He found buyers. It is our contention that they were all straw buyers. It is admitted, by the Plaintiff at least, that five of them were what I call straw buyers. They didn't have any money of their own invested in the property.

There is some dispute over three of those properties, but I will address that in just a moment.

In connection with each of the mortgage loans, the Plaintiff sought insurance from my client, Investors Mortgage [p. 5] Insurance Company. My client reviewed the documentation that was submitted to them, which is set forth in the briefs herein, but essentially it is the loan application, all of the documents that go into making a loan.

Based upon those documents, my client issued commitment/policy to the Plaintiff on each of the loans. Those commitment/policies are in Exhibit B in my original Motion for Summary Judgment.

IMI, my client, thought they were insuring loans where the sales price was $94,000, where the appraised value was $94,000 and where the loan amount was 80 percent of the value of the property or approximately $75,200. That's what they thought.

In reality, that was not true. The truth was that there was no money involved in these transactions other than the loan amounts and the true loan to value ratio was 100 percent, because in essence the properties were being sold for the loan amounts.

These borrowers, there are six total borrowers, had no money of their own at stake, they made no down payment, they had no earnest money on deposit with any realtor.

The risk to my client when the loan changes from an 80 percent loan to 100 percent loan increases astronomically.

The relevant statutory framework that we need to look at, and the Court has previously granted partial summary [p. 6] judgment in this matter with respect to the applicability of Section 3609 of Title 36 of the Oklahoma Statutes.

That statute basically provides that once the Court finds that a misrepresentation, omission, concealment of fact or incorrect statement has been made, there is a second-prong to the test and that is in order to avoid liability under the policy, you must satisfy one of three elements; either the misrepresentation, incorrect statement, concealment of fact or omission must be fraudulent or must be material to the acceptance of the risk or the hazard assumed or the insurer in good faith would not have issued the policy had the true facts been known.

It has been contended by the Plaintiff that they were innocent in this transaction, that they had no knowledge that these borrowers weren't really making the down payments.

The statute provides that the representations made by or in behalf of the insured are sufficient to void the policy if they meet the terms of the statute.

The borrowers were making statements on behalf of Firstier, there's no question about that from the documents that are submitted to you. The affidavit of purchaser and vendor which had to be submitted at the time the policies were issued specifically says that to induce the mortgage insurer to insure these loans, you are representing that these facts are true. Well, they weren't true.

Even aside from that, the policies of insurance on [p. 7] their face state that there is to be a loan to value ratio of 80 percent. That was not true in this case.

The question becomes whether the loan to value ratio is material to the risk or in good faith IMI, my client, would not have issued these policies. We don't have to show that Firstier, the Plaintiff in this matter, knew about the fraud that was being perpetrated by these borrowers and by the seller.

If the Legislature had intended for knowledge to be a prerequisite, they would have left it with one alternative – fraudulent. But they didn't do that, they

left it in the disjunctive. It can be fraudulent or it can be material to the risk or in good faith the insurer wouldn't have issued the policy. Any one of those three will void the policy.

There are some cases that are nearly directly on point. Particularly one, *United Guaranty v. Pioneer,* which is cited in the briefs in this matter. It is out of the Southern District of Florida. Essentially in that case the borrowers had misrepresented their income. But Florida had at that time an identical statute with the Oklahoma statute and the Florida Court gave judgment for the insurer.

In terms of meeting the materiality test, there is a case out of the Ninth Circuit, a 1987 case, *Verex v. John* [p. 8] *Hanson.* That case basically describes mortgage guaranty insurance. In paraphrasing it, it basically says there's very few things more material to mortgage insurance than the loan to value ratio. It measures the risk of the insured.

The most recent case interpreting Section 3609 under Oklahoma law is a case called *Coptin v. Shelter Insurance.* It is an Oklahoma Court of Appeals case. That case dealt with a situation where there was a theft loss and the insured had failed to disclose to the insurer that its property had previously had a fire loss several years prior or that the property was for sale at the time of obtaining the insurance.

The Court of Appeals in reversing a jury verdict for the insured basically interpreted Section 3609 and held that even innocent misrepresentations would be sufficient to void a policy of insurance under Section 3609.

I had told the Court that I would come back to those three policies where there is some dispute. The policies where there is some dispute were taken out by a man by the name of Charles Wolfus and a couple

by the name of Park and Glenda Largent. The Largents bought two of these properties and Mr. Wolfus purportedly bought one.

Each of these persons has testified under oath that they — well, Mr. Largent and Mrs. Largent testified they assumed they made the down payments, but they didn't know, didn't remember. Mr. Wolfus testified without a doubt he took [p. 9] a cashier's check to the closing payable to American First Abstract Company.

I think that the record will reflect that these statements are absolutely false. The Largents, based upon their financial position at the time and the source of their down payment, could not have possibly purchased two of these properties.

The Largents' source of down payment or settlement monies for one of the properties was to be from the sale of some other property that they had.

That property was shown as being sold on a settlement statement, but two days later the property was deeded back to the Largents and they therefore had no funds from the sale of that property to make the down payments in this case. Their other liquid funds were simply not sufficient.

Mr. Wolfus as well says that he gave a cashier's check to American First Abstract. Well, we subpoenaed the records of Mr. Bill Tucker, the seller in this case, from his bank. The bank records show eight checks written on Mr. Tucker's personal account; some of them, particularly in the case of the Largents', with the notation "Largents" at the bottom of them, in the exact amounts needed to close the loans at American First.

The truth is Mr. Tucker made the down payments. It [p. 10] was a wash to him. He put the money in, he got the money back, because he was the seller. The checks are written on the exact days of closing. Not

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all eight loans closed on the same day, they were over a period of time. But each check was written on the exact day that closing was to occur on one of the loans. It was written in the exact amount of the amount necessary, down to the penny, the amount necessary to pay under the settlement statement. They were all payable to American First Abstract in cash by American First Abstract.

There has been briefing in this case on the issue of the knowledge of the agent, American First, being imputed to Plaintiff Firstier.

I can address that if the Court wishes, but we do not contend or believe that the issue of Firstier's knowledge is in any way necessarily relevant. We have met the terms of the statute otherwise, but even if knowledge is relevant, we believe that the knowledge of that agent, American First Abstract in taking those eight checks from the seller, having no buyer with any money there giving it a check to American First should be imputed to Firstier since American First could do nothing but act for Firstier at that closing. It was an escrow agent. It took the money of Firstier, it took the instructions of Firstier as to how to disburse that money and when to disburse it and took on the responsibility of seeing that all of the documents were properly filed and executed. [p. 11]

There is one additional matter and that is there are two causes of action by Firstier in this matter. The first cause of action is on the eight loans. The second is a bad faith claim.

We would ask that if the Court grants summary judgment, that the Court grant summary judgment on the bad faith claim as well. My client cannot be in bad faith if the underlying policies are void. Thank you.

THE COURT: Mr. Dawson.

MR. DAWSON: If it please the Court, we have not addressed these bad faith issues in any of the briefs

at all. We could, I suppose, file another mountain of briefs on that if necessary, but I don't think so. I won't speak to that issue.

These two parties before this Court were at one time, and we say still are, risk partners. Those are words that were chosen by the insurance company. They told us, "We are going to be your risk partners." They chose those words.

Both of us are going to take a risk on the reliability of borrowers, people who are going to borrow money from my client. My client is going to loan 100 percent of the money. We are going to, in addition, pay them some premium and they are going to help us out to the extent of 20 percent of our loss if the buyers aren't reliable. So we are really out there. [p. 12]

What we do — there is no application — what we do is every bit of the documentation that we have gathered in order to make our decision as to whether to loan these people money, we take all of those documents and give them to the insurance company for their review.

We have the affidavit in this case, we filed it, of Mack Martin who worked for the company at that time. He says, I'll paraphrase and quote part, "I and my underwriters independently decide whether to insure the lender." They make their own decision based upon these documents. They are required to examine all documentation furnished by lender and make their own independent determination to quote, "Share the risk." The reason he puts that in quotes is because that's the insurance company's language, "Share the risk".

Now we made no misrepresentation to IMI. We made no representation at all. What the insurance company wants to say is that the false statements of these borrowers who we both are worried about, they were false. Well, those statements weren't made on

behalf of the lender. They were made to the lender to make us do something, make us loan 100 percent of the money.

The affidavit that opposing counsel talks about is an affidavit prepared by the insurance company and the borrowers make those statements directly to the insurance company. They are not made on my behalf, on behalf of [p. 13] Firstier Insurance Company, nothing is.

We have the Brunson case which we have cited in our brief, *Brunson v. Midwestern Life Insurance Company*. It says that a misrepresentation in insurance is a statement which the insured – that would be Firstier – which the insured states with the knowledge that it is untrue and with an intent to deceive. That's what they are going to have to prove my client did; that we knew a statement we made was wrong and we meant to deceive them or they can prove that we made a statement positively without knowing whether it was true or not.

If they can prove either one of those things, then we have made a misrepresentation under this 1976 case from the Oklahoma Supreme Court.

No statement that we made was untrue at all. Particularly we made no statement that we knew anything was positively true. What we say is, what they have us to say and the only representation we make at this time back in 1982 was that the statements made in the affidavit, the affidavit being made by the lender, to the best of our knowledge – and that's the words which IMI carved out for us to say, "To the best of our knowledge, those statements are true and correct."

That is true. At that point those statements were true and correct to the best of the knowledge of Firstier or they wouldn't be loaning 100 percent, they wouldn't be loaning [p. 14] 90 or $80,000 or whatever it is.

That's the way it was. That's all they asked us to tell them at that time. To the best of our knowledge, these statements are true. There's not a scintilla of evidence that Firstier had any idea that anything was going on at the time it was going on.

Now in 1984, after this, the insurance company changed and if – this is the point – if we had signed-on in '84, then we wouldn't be here today. There would be no case at all, there would be none, because later, before we made our claim but after we got our insurance policy, they changed. Then we would have to agree that the warranties – I'm quoting – "The warranties, representations and statements made herein and the documents, forms and other written matter submitted in the process of obtaining this commitment, whether made by the insured, the borrower or any of the parties shall be deemed warranties, representations and statements of the insured and which shall be deemed material for purposes . . ." and so forth.

After 1984, lenders had to agree that any statement made by the borrower was their statement. But before 1984, they didn't make that. That is the pivotol point on this case. Are the statements made by the borrowers our statements? No. Are they made on our behalf? No. They were made to us and they were made directly to IMI, but not by us [p. 15] or on our behalf.

This case is like the fellow who has a house and he wants to insure it against termites. He tells the insurance company, "I don't think I have termites. You come look at my house." They go look at the house and it turns up they don't think he does and they issue the policy but later they determine all the time he had termites.

Or a health insurance policy where the man says, "I think I'm in good health" and later it is determined that he had some kind of disease or something.

There is a case just like that. It is the Whitlack case, a Oklahoma case, 1968, *Whitlack v. John Hancock*. This fellow knew that he had shortness of breath and chest pain, knew that he had high blood pressure, but he made an application saying he was in sound health. He later died two months after he got the insurance policy of a coronary thrombosis.

The trial Court ruled against the widow. But the Supreme Court said, "No, because the rule" – I'm quoting – "The rule consistently applied by this Court in a multitude of decisions is that the question of falsity of statements in an application for life insurance and the applicant's intent in making such statements are questions for determination by the jury."

Whether the applicant intended to deceive is a [p. 16] question for determination by the jury, says the Whitlack case. That was a health and accident or life insurance case like I was talking about.

IMI told us all the time that after we make our review, our independent review of these documents and after we issue this policy, we are going to come around and spot-check. If we find that we have been deceived, do you know what we are going to do? Nothing. We are not going to cancel this policy if we find out the borrower or the appraiser has deceived you and us. That's in their manual.

Their policy is different now, but back when we came on board with them, their policy – and we have supplied this with our materials – says that "Negative review findings in no way affect the validity of the commitment or policy of insurance which has been issued."

If they review these loans and find bad acts, that's just a service that they will prepare for us. Frequent and significant variations will cause IMI to contact the lender to determine the cause of the discrepancies and try to help identify the problem and so forth.

On appraisals, on spot-checking these appraisals, after the policy is issued, if they think something is wrong, they will engage a qualified, independent appraiser to prepare a report on fair market value of the property and if they find chronic problems with individual fee appraisers, it will share [p. 17] that knowledge with lenders as a part of IMI's risk partnership with the lender.

In other words, they say we are going to spot-check all of these loans. If we find out the appraisers are phony or if we find out the borrowers are crooked, we are going to tell the lender. We are going to share that knowledge with you as a part of our risk partnership with you. We are not going to cancel the policy because of it, because they couldn't at that time. That wasn't their policy then. They have got new owners and they have got new policies now.

The affidavit of Mack Martin who worked for them at the time, the vice president in this region, said that he knew of no policy that had ever been canceled because of these reviews after the policies were issued. It had never happened before. Well, that changed. But it changed after this policy was issued, Your Honor.

That's the important part of this lawsuit. Again I'll tell you, admit, that if we had taken out these policies in 1984 after the policies changed, we wouldn't be here. This lawsuit wouldn't have been filed. We couldn't have filed it. Before then we could have. It was a different contract we had.

Counsel talked a little bit at the end about the agent, American First. In this case we have filed, when they brought up that issue late in the case, we got an affidavit [p. 18] and went down to American First, went through the situation with them and we have an American First affidavit that's filed in the case.

American First says, We are not the agent of Firstier here. We are a stakeholder and that's all we are. We have no knowledge of anything that was done wrong anyway. We don't have any knowledge that anything was done wrong. Our files are perfectly in order. We don't have any knowledge.

I don't see the relevance of even bringing up the closer in this case under the facts in this case.

Thank you, Your Honor.

THE COURT: Yes.

MR. GRAY: Brief rebuttal, Your Honor.

Counsel discussed the contract between the parties. The contract between the parties is contained in the commitment policy. Briefly I would like to tell or read to the Court what that contract says.

It says, "In consideration of the premium paid by the insured lender and the representations made by the insured lender below and in the application submitted, Investors Mortgage Insurance Company agrees to pay insured lender subject to the terms and conditions of this policy any loss sustained by reason of the default by the borrower in payments upon the loan identified as follows." Then they identify the loan.

The loan is identified as having a sales price of [p. 19] $94,000 and an appraised value of $94,000, a loan to value ratio of 80 percent.

At the bottom of the contract between the parties, it states, "Representations: The insured lender hereby represents that the loan transaction designated above has been closed, the loan is not in default. Any special conditions set forth herein have been satisfied by the buyer/seller affidavit that we made reference to previously and other necessary documents have been forwarded to the company and that the appropriate premium has been paid."

That's the contract between the parties. These representations are the representations of Firstier. But even if they are not, they are the representations made by borrowers on behalf of Firstier.

It was stated that there's not a scintilla of evidence that Firstier knew. Obviously Investors Mortgage Insurance disputes that fact.

I won't dwell on this, Your Honor, but the loan officer who took the applications for these loans was the same individual. Some of the borrowers testified that they never personally met with him even though the loan applications state on their face that they were taken by face-to-face interview.

I think that should this case gone to trial, there [p. 20] will be quite a great amount of circumstantial evidence at least that Firstier's agents knew what was happening and perhaps we might even have evidence that Firstier's agents were participants in the original scheme to create these straw sales.

Nevertheless, I don't want the Court to even consider that, but I do want to address a couple of other points. It was stated that in 1984 that IMI changed their policy provisions.

I don't believe, as we have stated in our brief, that that can be relevant to any issue. IMI has never taken the position that it is all right to defraud them. That appears to be what is being said, that it is okay if we are deceived. Well, it's not okay.

In 1984, if there was any purpose for doing that, for changing that policy, it was to clarify what had always been the policy.

Reference was made to the spot-check reviews. The spot-check reviews were testified to by Mr. Joe Pasternack who is the vice president of IMI who wrote the manual that Mr. Dawson made reference to.

Mr. Pasternack testified that he had no intent when writing that manual to allow fraud to be perpetrated on IMI. These spot-checks that are performed after the fact on about five percent of the loans are to assure quality control. [p. 21]

The loans that are the subject of the litigation today were not ever subject to that spot-check review. It is completely irrelevant. But even if it is somehow thought to be relevant, it is tantamount to saying that it's okay to defraud us. That would never be said by any insurance company and certainly wasn't the intent of Investors Mortgage Insurance in this case.

It was also stated previously that intent is always a question for the jury. Now I totally agree with that. But I also would show the Court that intent is not an issue in this case. The intent of Firstier in obtaining these mortgage insurance policies is not an issue. The issue before the Court is the interpretation of Section 3609 and its applicability to these facts.

Thank you, Your Honor.

THE COURT: Does counsel have anything further to say?

MR. DAWSON: I think we probably both have a lot more to say, but I think it would be repetitive. I don't have anything further.

THE COURT: As I said earlier, I have read and reread the pleadings, read and reread the exhibits and I have come to the conclusion that the insurance company relied on the package in making these various policies to guarantee the payment of the buyer of the property. [p. 22]

There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay these properties.

I find no justification for dropping the appraised value from $94,000 down to where they did.

I find that the policies should be and are cancelled as void for want of fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.

Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.

The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and does void the policy.

Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about. [p. 23]

How much time do you want to submit this to the Court?

MR. GRAY: Would ten days be inappropriate, Your Honor?

THE COURT: That would be all right. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to to make the deal. I think that's the only reason it was done.

Is there anything else to come before the Court?

MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

Is it the Court's ruling – I'm not arguing with the Court at all – that that was a bad faith of Firstier or dishonesty in the mind of Firstier? [p. 24]

THE COURT: Well, it would be the bad faith of Firstier.

MR. DAWSON: Okay.

THE COURT: And the bad faith of the borrower, both of them. They worked together.

MR. DAWSON: Thank you, Your Honor, for that clarification.

MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it.

I don't agree it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.

THE COURT: That will be the ruling.

Court is in recess.

CERTIFICATION

I, Lynn Hilton, Official Court Reporter, do hereby [p. 25] certify that the foregoing 24 pages constitutes a true and complete transcription of my shorthand notes as taken by me on the date set forth herein.

Dated this the 12th day of February, 1989.

/s/ _____
Lynn Hilton, CSR, RPR/CP

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DEFENDANT'S APPLICATION FOR AWARD OF ATTORNEY'S FEES AND SUPPORTING BRIEF

Dated February 10, 1989
(Caption Omitted in Printing)

COMES NOW THE DEFENDANT, Investors Mortgage Insurance Co. ("IMI"), and pursuant to 12 O.S. §3629(B) and Local Court Rule 6(E) applies to this Court for an award of its attorney's fees incurred in this action. In support of this Application, IMI would show the Court as follows:

1. On March 18, 1987, the Plaintiff, Firstier Mortgage Co. ("Firstier") filed its Complaint in the instant action. In its March 18, 1987 Complaint, Firstier sought actual and punitive damages for IMI's alleged bad faith refusal to pay certain claims that Firstier had submitted on eight policies of private mortgage insurance underwritten by IMI.

2. On April 1, 1988, after undertaking considerable discovery, IMI moved for summary judgment on each of the eight policies of private mortgage insurance on the ground that there was no genuine issue as to any material fact and that IMI was entitled to judgment as a matter of law.

3. On January 26, 1989, after extensive briefing by the parties and after oral argument, this Court granted IMI's Motion For Summary Judgment. Consequently, IMI is the prevailing party in this action.

LEGAL ARGUMENT AND AUTHORITIES

PROPOSITION

IMI IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES UNDER 36 O.S. §3629(B) AS THE PREVAILING PARTY.

36 O.S. §3629(B) provides that the prevailing party in an action to recover on an insurance policy is entitled to recover its attorney's fees. Specifically, 36 O.S. §3629(B) provides, in relevant part:

> Upon a judgment rendered to either party, costs and attorney's fees shall be allowable to the prevailing party.

Section 3629(B) encompasses all types of insurance and has specifically been held to apply to suits involving private mortgage insurance policies like those that were at issue in the instant case. In a recent case from the Western District of Oklahoma, styled and numbered *Wisconsin Mortgage Assurance Corp. v. American Mortgage and Investment Co.*, No. CIV-87-1152-W (W.D. Okla. 1988) (the "AMICO case"), the Honorable Lee R. West relied on 36 O.S. §3629(B) to grant attorneys fees to an insurance company which had prevailed in a suit involving policies of private mortgage insurance. The Order granting attorney's fees in the AMICO case is attached hereto as Exhibit "A".

The United States Court of Appeals for the Tenth Circuit has stated with respect to 36 O.S. §3629(B) that "[t]he insurer is the prevailing party where the . . . insured [sic] [insurer?] rejects the claim and no judgment is awarded". *An-Son Corp. v. Holland America Ins. Co.*, 767 F.2d 700, 703 (10th Cir. 1985). IMI is clearly the prevailing party in the instant case since judgment was entered in favor of IMI as a matter of law and Firstier took nothing by way of its Complaint. Accordingly, pursuant to 36 O.S. §3629(B), IMI is entitled to an award of its attorney's fees incurred herein.[1]

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[1] Although a formal entry of written judgment has not yet been entered by this Court, Local Court Rule 6(E) provides that an application for attorney's fees may be filed "after the judgment is rendered (by notification or announcement of a decision)."

Pursuant to Local Court Rule 6(E)(1), the Affidavit of Eric S. Gray, an attorney with Edwards, Roberts & Propester, P.C., who are the attorneys of record for IMI, is attached hereto as Exhibit "C" and incorporated herein by reference. Mr. Gray's Affidavit shows that he has personal knowledge of the services provided by Edwards, Roberts & Propester, P.C. during the course of prosecuting the instant action; that he has personal knowledge of the amount of time Edwards, Roberts & Propester, P.C. spent on this case, that he has personal knowledge of the hourly fees charged by Edwards, Roberts & Propester, P.C.; that the sum of $63,227.27 is the amount billed by Edwards, Roberts & Propester for attorney's fees and out-of-pocket expenses taxable as attorney's fees through January 26, 1989 with respect to this action; and that said sum is a reasonable fee for prosecuting this action.

The sum of $63,227.27 that IMI requests for attorney's fees represents charges for services rendered in the amount of $59,956.25 by Edwards, Roberts & Propester, P.C. and out-of-pocket expenses taxable as attorney's fees in the amount of $3,271.02 for the period from the commencement of this action through January 26, 1989. Because the fees for preparing this Application are not included and because IMI has incurred additional attorney's fees in connection with preparing the Suggested Findings of Fact and Conclusions of Law pursuant to this Court's Order at the January 26, 1989 hearing on IMI's Motion for Summary Judgment, IMI respectfully requests leave to file a Supplementary Affidavit for additional attorney's fees incurred after January 26, 1989. Additionally, pursuant to Local Court Rule 6(E) and 28 U.S.C. §1920, IMI is filing contemporaneously herewith a separate Application for Award of Costs to recover costs reasonably necessary for the prosecu-

tion of this action in the amount of $10,213.12. A copy of IMI's Application for Award of Costs is attached hereto as Exhibit "B".

WHEREFORE, IMI prays that it have and recover a judgment against Firstier for a reasonable attorney's fee in the amount of $63,227.27, costs in the amount of $10,213.12, and that IMI be granted leave to file a Supplementary Affidavit for additional attorney's fees within ten (10) days after this Court formally enters its Findings of Fact and Conclusions of Law.

Respectfully submitted,

John P. Roberts
Eric S. Gray

Of the Firm:

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ATTORNEYS FOR DEFENDANT,
INVESTORS MORTGAGE
INSURANCE CO.

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

BILL OF COSTS

Dated February 10, 1989

announced

Judgment having been ~~entered~~ in the above entitled action on January 26, 1989 against Firstier Mortgage Co., aka Realbanc, Inc. the clerk is requested to tax the following as costs:

Fees of the clerk	$
Fees for service of summons and complaint.....	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side). See Exhibit "A"	659.25
Fees for exemplification and copies of papers necessarily obtained for use in case. See Exhibit "B"	3,208.09
Docket fees under 28 U.S.C. § 1923.....	
Costs incident to taking of depositions. See Exhibit "C".....	6,345.78

Costs as shown on Mandate of Court of Appeals	
Other costs (Please itemize).....	
TOTAL	$10,213.12

. . . .

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

DEFENDANT'S SUPPLEMENTARY APPLICATION FOR AWARD OF ATTORNEY'S FEES AND SUPPORTING BRIEF

Dated March 15, 1989
(Caption Omitted in Printing)

1. The Defendant, Investors Mortgage Insurance Co. ("IMI"), pursuant to 12 O.S. §3629(B) and Local Court Rule 6(E), filed its initial Application for Award of Attorney's Fees and Supporting Brief on February 10, 1989 to recover a reasonable attorney's fee and costs for the period from the inception of this action until January 26, 1989. In this Supplementary Application for Award of Attorney's Fees, IMI respectfully requests that it also be awarded a reasonable attorney's fee and its costs for the period from January 27, 1989 until February 15, 1989.

2. This Supplementary Application is submitted pursuant to 36 O.S. §3629(B) and Local Court Rule 6(E). IMI expressly incorporates by reference the initial Application for Award of Attorney's Fees and Supporting Brief filed herein on February 10, 1989 and the legal arguments and authorities set forth therein.

3. Pursuant to Local Court Rule 6(E)(1), the Affidavit of Eric S. Gray, an attorney with Roberts, Gray, Goresen & Moriarty, P.C., who are the attorneys of record for IMI, is attached hereto as Exhibit "A" and incorporated herein by reference. Mr. Gray's Affidavit shows that he has personal knowledge of the attorney services provided during the course of prosecuting the instant action; that he has personal knowledge of the amount of attorney time spent on this case, that he has personal knowledge of the hourly fees charged; that the sum of $65,979.37 is the

amount billed to IMI for attorney's fees and out-of-pocket expenses taxable as attorney's fees through February 15, 1989 with respect to this action; and that said sum is a reasonable sum for services rendered in this action.

4. The sum of $65,979.37 represents charges for attorney services actually rendered and billed in the amount of $62,516.25 and out-of-pocket expenses taxable as attorney's fees in the amount of $3,463.12 for the period from the commencement of this action through February 15, 1989. The out-of-pocket expenses represent items normally itemized and billed to clients and are not normally absorbed into overhead. Thus, such items are recoverable as part of the fee award. *See, Ramos v. Lamm,* 713 F.2d 546, 559 (10th Cir. 1983).

5. The criteria for the awarding of a reasonable attorney's fee were delineated in *State ex rel. Burk v. Oklahoma City,* 598 P.2d 659, 661 (Okla. 1979) and *Oliver's Sports Center v. National Standard Ins.,* 615 P.2d 291, 295 (Okla. 1980). Pursuant to those decisions, the proper procedure for establishing a reasonable attorney's fee is to determine the hourly compensation on an hourly rate basis and then add an additional amount based on the following factors:

(a) the time and labor required;

(b) the novelty and difficulty of the questions;

(c) the skill requisite to perform the legal service properly;

(d) the preclusion of other employment by the attorney due to the acceptance of the case;

(e) the customary fee;

(f) whether the fee is fixed or contingent;

(g) time limitations imposed by the client or the circumstances;

(h) the amount involved and the results obtained;

(i) the experience, reputation and ability of the attorneys;
(j) the undesirability of the case;
(k) the relationship and length of the professional relationship with the client; and
(l) awards in similar cases.

Oliver's Sports Center, 615 P.2d at 294-95. Similar procedures for determining fee awards in federal question cases have been adopted by the Tenth Circuit. *See, Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983).

6. IMI respectfully submits that the proper amount of attorney's fees to be awarded in its favor and against Firstier is $78,362.12, based on a total of 770.8 hours reasonably expended by various attorneys and law clerks at the hourly rates set forth in the Affidavit of Eric S. Gray attached hereto as Exhibit "A".[1] IMI also requests that it be awarded an enhancement or bonus in an amount to be determined by the Court in accordance with the guidelines discussed above for the following reasons:

a. Additional attorney's time will be needed to present IMI's Motion to Tax Costs and Fees;
b. The questions presented for resolution involved difficult legal issues with respect to how lender and borrower fraud affect an insurance company's obligation to pay on an insurance policy. Such issues had not previously been addressed in a reported decision in Oklahoma;
c. Because of the difficult legal issues, the requisite skill necessary to competently provide the legal services was heightened;
d. Representation of IMI in the instant case was made more difficult and required more time and attention to details than otherwise might be required because Firstier challenged virtually every legal and factual issue presented in this case. Counsel's efforts were obviously very successful considering that IMI's Motion for Summary Judgment was granted and Firstier's claims were dismissed, thereby giving IMI a complete and total victory.

[1] This amount includes $3,463.12 for out-of-pocket expenses that are taxable as fees. *See. Ramos v. Lamm,* 713 F.2d 546, 559 (10th Cir. 1983).

7. Additionally, pursuant to Local Court Rule 6(E) and 28 U.S.C. §1920, IMI filed contemporaneously with its February 10, 1989 Application for Award of Attorney's Fees a separate Application for Award of Costs to recover costs reasonably necessary for the prosecution of this action through January 27, 1989 in the amount of $11,343.70. To the extent that such costs are not recoverable under 28 U.S.C. §1920, IMI requests that such costs be taxed as attorney's fees pursuant to *Ramos v. Lamm,* 713 F.2d 546, 559-60 (10th Cir. 1983).

WHEREFORE, IMI prays that it have and recover a judgment against the Plaintiff, Firstier Mortgage Co., for a reasonable attorney's fee in the amount of $78,362.12, costs in the amount of $11,343.70, and a bonus in an amount to be determined by the Court.

Respectfully submitted,

JOHN P. ROBERTS
ERIC S. GRAY
GREGORY F. PILCHER
ROBERTS, GRAY, GORESEN
& MORIARTY
Suite 1340 American First Tower
Oklahoma City, Oklahoma 73102
405-235-0123

ATTORNEYS FOR DEFENDANT,
INVESTORS MORTGAGE
INSURANCE CO.

(Certificate of Mailing Omitted in Printing)

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

AFFIDAVIT OF ERIC S. GRAY IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEY'S FEES

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Eric S. Gray, after being first duly sworn and upon his oath, states as follows:

1. For the time period from the commencement of this action through the date hereof, I have been an attorney of record on behalf of the Defendant, Investors Mortgage Insurance Co., in the above-captioned action. At the commencement of this action, I was an attorney with the Oklahoma City law firm of Edwards, Roberts & Propester, P.C. I am now an attorney with the Oklahoma City law firm of Roberts, Gray, Goresen & Moriarty, P.C. As an attorney of record, I have been involved on a day-to-day basis in all aspects of the preparation and litigation of this action, and I have personal knowledge of the services performed by the firms of Edwards, Roberts & Propester, P.C. and Roberts, Gray, Goresen & Moriarty, P.C., during the course of prosecuting the instant action.

2. Affiant and his firm maintain daily time records, charging all times in increments of one-

tenth of an hour. Attached hereto as Exhibit "1" and incorporated herein by reference is a Summary of Attorney's Fees, Expenses and Costs charged to Investors Mortgage Insurance Co. by Edwards, Roberts & Propester, P.C. for the billing period from April 13, 1987 until February 15, 1989. The Summary of Attorney's Fees, Expenses and Costs reflects attorney's fees, exclusive of costs, in the amount of $62,516.25 and out-of-pocket expenses taxable as attorney's fees in the amount of $3,463.12, for a total of $65,979.37.[1] I prepared the Summary of Attorney's Fees, Expenses and Costs from the daily time records and detailed billing entries attached to IMI's initial Application for Award of Attorney's fees and Supporting Brief and from the supplemental daily time records and detailed billing entries attached hereto as Exhibit "2". I have personally examined said billing entries and find them to be accurate and correct.

3. As more fully set forth in the referenced daily time records and detailed billing entries, the affiant and his firm expended a total of 770.8 hours for professional services rendered on behalf of IMI. The time spent by attorneys was as follows:

(a)	Eric S. Gray (ESG)	208.4 Hours
(b)	John P. Roberts (JPR)	75.7 Hours
(c)	Thomas P. Goresen (TPG)	18.0 Hours
(d)	Thomas P. Howell III (TPH)	1.7 Hours
(e)	Linda J. Burgess (LJB)	323.5 Hours
(f)	Gregory F. Pilcher (GFP)	127.0 Hours
(g)	Kelly W. Lewis (KWL)	3.9 Hours
(h)	Michelle Campney (MC) (Clerk)	6.0 Hours
(i)	Greg Pilcher (GP) (Clerk)	4.0 Hours
(j)	Carmen Gomez (CG) (Clerk)	8.6 Hours
	TOTAL HOURS	770.8 Hours

[1] This amount represents fees and out-of-pocket expenses taxable as fees that affiant and his firm *actually* billed to IMI. The actual fees billed are significantly less than the fees that would normally be charged by affiant and his firm for even routine matters because affiant and his firm substantially discounted the fees in the interest of client goodwill. Thus, the fees actually billed are substantially less than the reasonable fee to which IMI is entitled.

4. The charges by Affiant and his firm for routine, non-complicated matters, without consideration of size and degree of responsibility, difficulty, complexity and results achieved, is as follows:

(a)	Eric S. Gray (ESG)	$125.00/Hour
(b)	John P. Roberts (JPR)	$125.00/Hour
(c)	Thomas P. Goresen (TPG)	$125.00/Hour
(d)	Thomas P. Howell III (TPH)	$125.00/Hour
(e)	Linda J. Burgess (LJB)	$ 80.00/Hour
(f)	Gregory F. Pilcher (GFP)	$ 80.00/Hour
(g)	Kelly W. Lewis (KWL)	$ 80.00/Hour
(h)	Michelle Campney	$ 40.00/Hour
(i)	Greg Pilcher	$ 40.00/Hour
(j)	Carmen Gomez	$ 20.00/Hour

5. At the normal rates of compensation set forth above, a reasonable fee for professional services actually rendered would be determined as follows:

	Attorney	Hours	Rate	Fee
(a)	Eric S. Gray (ESG)	208.4	$125.00/Hour	$26,050.00
(b)	John P. Roberts (JPR)	75.7	$125.00/Hour	9,462.50
(c)	Thomas P. Goresen (TPG)	18.0	$125.00 Hour	2,250.00
(d)	Thomas P. Howell III (TPH)	1.7	$125.00 Hour	212.50
(e)	Linda J. Burgess (LJB)	323.5	$ 80.00/Hour	25,880.00
(f)	Gregory F. Pilcher (GFP)	127.0	$ 80.00/Hour	10,160.00

	Attorney	Hours	Rate	Fee
(g)	Kelly W. Lewis (KWL)	3.9	$80.00/Hour	312.00
(h)	Michelle Campney (MC)	6.0	$40.00/Hour	240.00
(i)	Greg Pilcher (GP)	4.0	$40.00/Hour	160.00
(j)	Carmen Gomez (CG)	8.6	$20.00/Hour	172.00
TOTAL FEES (Based on actual attorney time at normal rates)				$74,899.00

6. In addition, IMI requests reimbursement for out-of-pocket expenses taxable as attorney's fees. During the reporting period in question, affiant and his firm charged IMI $3,463.12 for such out-of-pocket expense. The out-of-pocket expenses are summarized on the Summary of Attorney's Fees, Expenses and Costs attached hereto as Exhibit "2." The out-of-pocket expenses are taxable as fees because they represent items normally itemized and billed to clients and are not absorbed into overhead. Thus, total fees and out-of-pocket expenses taxable as fees amount to $78,399.62.

7. IMI also requests a bonus based on results achieved. IMI obtained excellent results in the instant case, having achieved a complete and total victory on Motion for Summary Judgment. Under such circumstances, IMI respectfully submits that it is entitled to an enhanced fee. *See, generally, State ex rel. Burk v. Oklahoma City,* 598 P.2d 659 (Okla. 1979); *Oliver Sports Center v. National Standard Ins.,* 615 P.2d 291 (Okla. 1980); *Ramos v. Lamm,* 713 F.2d 546, 557-58 (10th Cir. 1983).

8. In my professional opinion, the sum of $78,362.12 constitutes a fair and reasonable award of

attorney's fees and litigation expenses to be taxed against the Plaintiff, Firstier Mortgage Co.

FURTHER, THE AFFIANT SAIETH NOT.

ERIC S. GRAY

. . . .

(Acknowledgement Omitted in Printing)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

SUMMARY OF ATTORNEY'S FEES, EXPENSES AND COSTS

ATTORNEY FEES (per attached billing summary):		$62,516.25
OUT-OF-POCKET EXPENSES TAXABLE AS ATTORNEY'S FEES (per attached billing summary):		
Express Mail	$ 303.00	
Postage	85.89	
Long Distance Telephone Charges	214.94	
Travel expenses for out-of-state depositions	1,374.48	
Computerized legal research	1,408.01	
Taxi fares	76.80	
		3,463.12
TOTAL ATTORNEY FEES AND OUT-OF-POCKET EXPENSES TAXABLE AS ATTORNEY FEES		65,979.37
COSTS TAXABLE PURSUANT TO 28 U.S.C. §1920 (see Bill of Costs):		11,343.70
TOTAL FEES AND COSTS		$77,323.07

Edwards, Roberts & Propester P.C.
Suite 2900, First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102-5605
(405) 239-2121 EI# 73-1155781

February 3, 1989

Billed through 01/31/89

Bill number 366117-40087-030 ESG

Investors Mortgage Insurance Company
P.O. Box 570
Boston, MA 02102
Attn: Barbara Joy

Balance forward as of bill number 024 dated 01/09/89	$2,913.70
Payments received since last bill (last payment 01/30/89)	$2,913.70
Net balance forward	$ .00

First Tier Mortgage Co.
IMI Policy No. 457224
Borrower: Charles Wolfes
Lender Loan: 204253

FOR PROFESSIONAL SERVICES RENDERED

01/09/89	GFP	Reviewed files to determine status of case; summarized deposition of Robert Gondring.	4.60 hrs. 80/hr.	368.00
01/20/89	GFP	Discussed hearing on Motion for Summary Jugment with Eric Gray and preapred Briefs for review and preparation of oral argument.	.30 hrs. 80/hr.	24.00

01/23/89	GFP	Reviewed pleadings to prepare for hearing on IMI's Motion for Summary Judgment.	1.00 hrs. 80/hr.	80.00
01/24/89	GFP	Legal research regarding ability to draw adverse inferences from a witness who takes the fifth amendment; legal research regarding 36 O.S. Section 3609; preparation for hearing on IMI's Motion for Summary Judgment; legal research re agency.	3.50 hrs. 80/hr.	280.00
01/25/89	GFP	Westlaw legal research on agency issues; legal research on agency issue and on 36 O.S. Section 3609; documents necessary for hearing on Motion for Summary Judgment; prepared for hearing on Motion for Summary Judgment; reviewed depositions, documentary evidence and Affidavit.	4.60 hrs. 80/hr.	368.00
01/26/89	ESG	Prepare for hearing on Motion.	6.00 hrs. 125/hr.	750.00
01/26/89	ESG	Prepare for and argue Motion for Summary Judgment.	4.00 hrs. 125/hr.	500.00

01/26/89	GFP	Reviewed case law cited in Briefs and prepared for hearing on Motion for Summary Judgment with Erig Gray; legal research re whether attorney fees are recoverable by prevailing party and on time to file Application to Tax Costs and Fees; reviewed court files in AMICO case at Federal Courthouse for authority on attorney's fees issues.	4.30 hrs. 80/hr.	344.00
01/27/89	GFP	Reviewed fee workup to verfiy completeness and accuracy; continued legal research re recovery of attorney's fees under 36 O.S. Section 3629; reviewed default packages to assure that IMI's letters denying coverage were delivered within 90 days of date First Tier filed claims; drafted Motion for Award of Attorney's Fees and Affidavit of Erig Gray; Shepardized cases; reviewed Local Court Rules to assure compliance; reviewed and edited Motion and Affidavit.	3.60 hrs. 80/hr.	288.00

01/30/89	GFP	Began preparing Bill of Costs to be taxed by clerk; reviewed Judge West's Order granting attorney's fees in AMICO case and revised our Motion for Attorney's Fees accordingly. 1.50 hrs. 80/hr.	120.00
01/31/89	GFP	Drafted proposed findings of fact; legal research regarding 28 O.S. Section 1920 and what may be taxed as costs. 3.50 hrs. 80/hr.	280.00
		Total fees for this matter	$3,402.00

DISBURSEMENTS

01/27/89	Miscellaneous Expense — Westlaw usage	200.00
01/31/89	Photocopy Expense	41.00
01/31/89	Outside Photocopy Expense	5.90
01/31/89	Express Delivery Charges	15.00
	Total disbursements for this matter	$261.90

BILLING SUMMARY

Gray, Eric S.	10.00 hrs. 125/hr	1,250.00
Pilcher, Gregory F.	26.90 hrs. 80/hr.	2,152.00
TOTAL FEES	36.90 hrs.	$3,402.00
TOTAL DISBURSEMENTS		$ 261.90
TOTAL CHARGES FOR THIS BILL		$3,663.90
TOTAL BALANCE NOW DUE		$3,663.90

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

02/01/89	GFP	Reviewed billing summary and itemization of costs for reasonableness and accuracy; Drafted Bill of Costs and Exhibits detailing various cost categories; Reviewed and Revised Findings of Fact 6.00 hrs. 80/hr.	480.00
02/01/89	GFP	Reviewed letter from client re publishing Court's Order; Revised and edited Findings of Fact; Drafted Conclusions of Law 5.60 hrs. 80/hr.	448.00
02/03/89	GFP	Reviewed Findings of Fact and Conclusions of Law and revised as necessary; Drafted transmittal letter to client. 2.20 hrs. 80/hr.	176.00
02/06/89	GFP	Legal research re requirements for publishing district court decision; Shepardize cases cited in Conclusions of Law; Final revisions to findings of fact and conclusions of law; Transmittal letter to Judge L. Bohanon 1.4 hrs. 80/hr.	112.00

02/07/89	GFP	Discussed procedure for publishing decisions with court clerk; drafted letters to Judge Bohanon requesting publication; Drafted letter to client explaining publication requirements. .8 hrs. 80/hr.	64.00
02/10/89	GFP	Reviewed Application for Attorney's Fees; Drafted Summary of Fees and Costs; Drafted Affidavit in Support of Bill of Costs; Prepared exhibits for filing; Filed Application for Award of Fees; Filed Bill of Costs and docketed Appearance Date 3.00 hrs. 80/hr.	240.00
02/13/89	GFP	Drafted Supplemental Motion for Attorney's Fees; Drafted Supplemental Bill of Costs; Reviewed Preliminary Record on Appeal prepared by Court Clerk; Reviewed Fed. R. App. Proc. to determine time requirements for designation of record, ordering transcripts, filing briefs, etc. 3.00 hrs. 80/hr.	240.00

02/14/89	GFP	Reviewed Firstier's Objections to Suggested Findings of Fact and Reviewed Firstier's Findings of Fact; Reviewed and Revised Supplemental Applications for Attorney's Fees and Bill of Costs 1.40 hrs. 80/hr.	112.00

Edwards, Roberts & Propester, P.C.

CLIENT/MATTER INQUIRY

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

DATE	CODE	AMOUNT	DESCRIPTION
02/01/89	27	5.00	Express Delivery Charges
02/03/89	05	22.00	Express Mail Expense
02/06/89	26	40.85	Miscellaneous Expense — legal research on Westlaw
02/07/89	27	10.00	Express Delivery Charges
02/10/89	27	5.00	Express Delivery Charges
2/13/89	01	163.80	Photocopy Expense
TOTAL EXPENSE		340.40	

Edwards, Roberts & Propester, P.C.

CLIENT/MATTER INQUIRY

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

DATE	CODE	AMOUNT	DESCRIPTION
02/15/89	13	93.75	Court Reporter Fees — copy of transcript

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

NOTICE OF APPEAL
Dated February 8, 1989
(Caption Omitted in Printing)

Notice is hereby given that Plaintiff, Firstier Mortgage Co., hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judge's ruling announced by the Court in this action on the 26th day of January, 1989, but not yet entered on its judgment docket. F.R.A.P. 4(a)(2).

JANICE M. DANSBY and
JACK S. DAWSON -of-
Miller, Dollarhide, Dawson and Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

APPLICATION FOR EXTENSION OF TIME
TO FILE NOTICE OF APPEAL
Dated April 14, 1989
(Caption Omitted in Printing)

Pursuant to Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(5), FirsTier Mortgage Co. requests that this Court grant an extension of time to file a Notice of Appeal from the Court's Order and Judgment entered on March 3, 1989, for the following reasons:

1. We believe that the Court announced a final decision when it advised the parties on January 26, 1989 that it would sustain Defendant's Motion for Summary Judgment. Pursuant to F.R.A.P. 4(a)(2), we filed FirsTier's Notice of Appeal from the court's announcement of its decision on February 8, 1989. The Court entered its Order and Judgment on March 3, 1989. F.R.A.P. 4(a)(2) provides that the Notice of Appeal would be treated as if filed immediately after the Court entered its Order and Judgment memorializing its bench announcement. F.R.A.P. 4(a)(2); *Acosta v. Louisiana Department of Health and Human Resources,* 106 S.Ct. 2876 (1986); *Stevenson v. Grentec, Inc.,* 652 F.2d 20 (9th Cir. 1981).

2. We have recently learned that the Court of Appeals may be uncertain as to whether this Court made a final decision, in which it disposed of all the issues as to all the parties, when it made its announcement on January 26, 1989. We believe that the Court's decision was final on that date. However, if our understanding of the Court's intent was in error, the error was excusable. Our notice of appeal, if we were in error, would have been due on April 3, 1989.

3. Federal Rule of Appellate Procedure 4(a)(5) provides that the district court may grant an extension of time for filing a notice of appeal during the

period between 30 and 60 days following the entry of a final order based upon a showing of excusable neglect. Cases construing the rule say that counsel's good faith, though erroneous interpretation of the law, may be excusable neglect. *Feeder Tow Line Service, Inc. v. Toledo, P. & W.R.R. Co.*, 539 F.2d 1107, 1109 (7th Cir. 1976).

4. FirsTier requests that this Court grant it an extension of time until May 2, 1989 in which to file a Notice of Appeal from the Order and Judgment entered on March 3, 1989. FirsTier believes that such an extension will be an aid to the Court of Appeals because it will address a procedural question and allow FirsTier to preserve its valuable right to appeal.

5. Counsel for Defendant objects to the requested extension.

JACK S. DAWSON #2235
JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

ORDER
Dated April 24, 1989
(Caption Omitted in Printing)

NOW, on this 24th day of April, 1989, upon consideration of Plaintiff's Application for Extension of Time;

IT IS HEREBY ORDERED that Plaintiff, FirsTier Mortgage Co., be granted an extension of time from April 3, 1989 to May 1, 1989 in which to file its Notice of Appeal.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPROVED BY:

JACK S. DAWSON #2235
JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

NOTICE OF APPEAL
Dated April 25, 1989
(Caption Omitted in Printing)

Notice is hereby given that Plaintiff, FirsTier Mortgage Co., hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Court's Order and Judgment and Memorandum Opinion entered in this action on March 3, 1989.

JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

. . . .

(Certificate of Mailing Omitted in Printing)

Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

JACK S. DAWSON
Attorney of Record
JANICE M. DANSBY
MILLER, DOLLARHIDE, DAWSON & SHAW
1200 Colcord Building
Oklahoma City, OK
73102
(405) 236-8541

Attorneys for Petitioner

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the trial court's announcement of its decision granting Defendant's Motion for Summary Judgment, which disposed of Plaintiff's entire case, but reserved the right to enter judgment and findings of fact and conclusions of law, constitutes the announcement of a final decision within the meaning of Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2).

2. If the answer to Question No. 1 is in the negative, whether a premature notice of appeal may be considered as if taken from a subsequently entered final order, absent prejudice to appellee.

3. Whether objections to proposed findings of fact and conclusions of law are implied F.R.A.P. 4(a)(4) tolling motions.

4. If the answer to Question No. 3 is in the affirmative, whether the trial court's subsequently entered Memorandum Opinion and Judgment should be construed to implicitly overrule the implied tolling motions in order to defeat the appeal.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE TRIAL JUDGE ANNOUNCED A FINAL DECISION FROM THE BENCH ON JANUARY 26, 1989	9
A. As a Practical Matter, Trial Court's Announcement was a Final Decision	10
B. Court and Parties Treated Announcement as Final Decision	11
1. IMI Treated Decision as Final	12
2. Trial Court's Decision Meant to be Final	14
C. Entry of Judgment Not Essential to Final Decision	15
II. EVEN IF THE TRIAL COURT'S ANNOUNCEMENT WAS NOT A FINAL DECISION, THE NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED AFTER ENTRY OF THE ORDER, SINCE IMI CAN SHOW NO PREJUDICE	19
A. IMI Not Prejudiced by "Early" Appeal	20
B. Findings of Fact and Conclusions of Law Not Jurisdictional Prerequisite for Appellate Review	21
C. Rules Should be Interpreted to Maintain Appeals	22
D. IMI's Case Law Authorities Do Not Apply	25
E. Court of Appeals' Decision Inconsistent With Tenth Circuit's "Forgiving Attitude" Toward Early Appeals	27
F. Other Circuits Also Forgive Early Appeals	29
III. THERE WERE NO F.R.A.P. (4)(a)(4) TOLLING MOTIONS	31
IV. TRIAL COURT'S MEMORANDUM OPINION AND ORDER DID NOT IMPLIEDLY OVERRULE IMPLIED MOTIONS	34
CONCLUSION	35

TABLE OF AUTHORITIES

Cases:	Page(s)
Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986)	10
Agostino v. Ellamar Packing Co., 191 F.2d 576 (9th Cir. 1951)	35
Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc., 479 U.S. 966 (1986)	24
Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1977)	27
Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978)	16, 22-25, 30, 34
Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978)	21
Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1036-1037 (10th Cir. 1975)	10
Calculator's Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332 (9th Cir. 1982)	34
Carnes v. United States, 279 F.2d 378 (10th Cir. 1960)	25, 26
Catlin v. United States, 324 U.S. 229 (1945)	9
Century Laminating, Ltd. v. Montgomery, 585 F.2d 563 (10th Cir. 1979), *cert. dismissed*, 444 U.S. 987	26
Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988)	10

Cases:	Page(s)
Diamond by Diamond v. McKenzie, 770 F.2d 225 (D.C. Cir. 1985)	30
Director of Revenue, State of Colorado v. United States, 392 F.2d 307 (10th Cir. 1968)	26, 27, 35
Dowling v. City of Philadelphia, 855 F.2d 136 (3rd Cir. 1988)	29
Euziere v. United States, 266 F.2d 88 (10th Cir. 1959)	27
Featherstone v. Barash, 345 F.2d 246 (10th Cir. 1965)	22
Federal Savings & Loan Insurance Corporation v. Huff, 851 F.2d 316 (10th Cir. 1988)	27, 28
Ferguson v. International Association of Bridge, Structural and Ornamental Iron Workers, 854 F.2d 1169 (9th Cir. 1988)	25
First National Bank of Fort Smith, Arkansas v. Mattingly, 312 F.2d 603 (10th Cir. 1962)	22
Foman v. Davis, 371 U.S. 178 (1962)	19, 20
Freeman v. Hittle, 747 F.2d 1299 (9th Cir. 1984)	30
General Television Arts, Inc. v. Southern Railway Co., 725 F.2d 1327 (11th Cir. 1984)	26, 27
Gillespie v. U.S. Steel Corporation, 379 U.S. 148 (1964)	10

Cases:	Page(s)
Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1978)	21
Kasishke v. Baker, 144 F.2d 384 (10th Cir. 1944)	9
Knight v. Brown Transport Corp., 806 F.2d 479 (3rd Cir. 1986)	30
Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988)	27, 28
Lewis v. U.S. Postal Service, 840 F.2d 712 (9th Cir. 1987)	34
Milliner v. Government of the Virgin Islands, 593 F.2d 532 (3rd Cir. 1979)	22
Osterneck v. E.T. Barwick Ind., Inc., 825 F.2d 1521 (11th Cir. 1987), aff'd sub nom. *Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987 (1987)	27
Rivers v. Washington County Board of Education, 770 F.2d 1010 (11th Cir. 1985)	30
Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas, 753 F.2d 857 (10th Cir. 1985)	9
Robinson v. Tanner, 798 F.2d 1378, 1382-83 (11th Cir. 1986)	27
Sacks v. Rothberg, 845 F.2d 1098 (D.C. Cir. 1988)	29, 30
Sooner Products Company v. McBride, 708 F.2d 510 (10th Cir. 1983)	9

Cases:	Page(s)
United States v. F & M Schaefer Brewing Co., 356 U.S. 227 (1958)	11, 12, 15, 26
United States v. Green, 847 F.2d 622 (10th Cir. 1988)	17, 18
United States v. Hansen, 795 F.2d 35 (7th Cir. 1986)	27
United States v. Indrelunas, 411 U.S. 216 (1973)	15, 24
United States v. Moore, 616 F.2d 1030 (7th Cir. 1980), cert. den. 446 U.S. 987	18
White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1981)	17, 26

FEDERAL RULES OF PROCEDURE

	Page(s)
Federal Rule of Appellate Procedure 4(a)	18, 22, 26
Federal Rule of Appellate Procedure 4(a)(1)	20
Federal Rule of Appellate Procedure 4(a)(2)	2, 6, 7, 8, 10, 16, 17, 18, 25, 28-31, 35
Federal Rule of Appellate Procedure 4(a)(4)	2, 6, 8, 26, 31, 34
Federal Rule of Appellate Procedure 4(a)(5)	6
Federal Rule of Appellate Procedure 4(b)	17, 18
Federal Rule of Civil Procedure 8(f)	32
Federal Rule of Civil Procedure 52	22, 33, 34
Federal Rule of Civil Procedure 52(b)	32
Federal Rule of Civil Procedure 58	15, 22, 25
Federal Rule of Civil Procedure 59	19, 26, 27, 30, 32, 33, 34
Federal Rule of Civil Procedure 60	30
Federal Rule of Civil Procedure 73(a)	25

	Page(s)
Western District of Oklahoma Local Rule 14(A)	32, 33

STATUTES

28 U.S.C.S. §1254(1)	1
28 U.S.C.S. §1291	2, 7, 10, 16, 31

No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on September 26, 1989, and is not reported. It appears at p. A-1, *et seq.* of Petitioner's Petition for Certiorari. The opinion of the United States District Court for the Western District of Oklahoma was entered on March 3, 1989, is reported at 708 F.Supp. 1224 (W.D. Okla. 1989), and appears at pp. D-1 and E-1, *et seq.* of Petitioner's Petition for Certiorari.

JURISDICTION

This Court granted Petitioner's Petition for Writ of Certiorari on February 26, 1990, to review the judgment of the United States Court of Appeals for the Tenth Circuit. Jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. §1254(1).

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. Title 28 U.S.C.S. §1291 provides:

Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court or the District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§1292(c) and (d) and 1295 of this title.

2. Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(2) provides:

Appeal as of Right — When Taken

(a) Appeals in Civil Cases.

. . . .

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

3. F.R.A.P. 4(a)(4) provides:

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

FirsTier Mortgage Company, a/k/a Realbanc, Inc., ("FirsTier")[1] sued Investors Mortgage Insurance Company ("IMI") for refusal to honor eight private-mortgage-guaranty insurance policies. (J.A. p.4.)[2] IMI moved for summary judgment. (R. Doc. 106.)[3] On January 26, 1989, the trial court heard arguments on IMI's Motion for Summary Judgment. (J.A. p. 12.) On that date, the court announced its decision that all of the subject insurance policies were void for fraud, and that

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[1] FirsTier Mortgage Company's parent companies and subsidiaries are: FirsTier Financial, Inc.; FirsTier Bank, N.A., Omaha; FirsTier Bank, N.A., Lincoln; FirsTier Data Services, Inc.; FirsTier Leasing Co.; LeaseBanc Financial Corp.; FirsTier Services, Inc.; Asset Recovery Co.; DeLay First National Bank & Trust Co. of Norfolk; and FirsTier Brokerage Co.

[2] References to the Joint Appendix will begin with "J.A." followed by the page number in the Joint Appendix.

[3] References to the record below will begin with "R. Doc." followed by the document number as reflected on the docket sheet.

FirsTier's claim for punitive damages was moot. (J.A. pp. 26-28.) The court thereby disposed of FirsTier's entire action.

The court said, *inter alia:*

> I find that the policies should be and ***are cancelled*** as void for want of [sic] fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.
>
> Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.
>
> The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and ***does*** void the policy. (J.A. p. 27.)
>
> . . . .
>
> MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?
>
> MR. DAWSON: I would agree with counsel that ***if this action is dismissed, then the bad faith action must be dismissed along with it.*** I don't agree that it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.
>
> THE COURT: ***That will be the ruling.*** (J.A. p. 28.) (Emphasis added.)

The court directed counsel for both parties to submit their suggested findings of fact and conclusions of law for the court's use in preparing its Memorandum Opinion:

> Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court will then modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.
>
> How much time do you want to submit this to the Court?
>
> MR. GRAY: Would ten days be inappropriate, Your Honor?
>
> THE COURT: That would be alright. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

It is clear from a reading of the transcript and a review of the record below that the court and counsel for both parties treated the judge's announcement from the bench as a final decision.[4] The only thing that remained to be done was for the court to memorialize its decision in an order, with findings of fact and conclusions of law.

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[4] On February 10, 1989, IMI filed its Bill of Costs and Application for Attorney's Fees. (J.A. pp. 30 & 34.) IMI's Bill of Costs says: *"Judgment having been announced in the above entitled action on January 26, 1989. . . ."* (J.A. p. 34.) IMI repeatedly characterized itself as the prevailing party and as having achieved a complete and total victory on summary judgment. (J.A. pp. 30 & 39.) FirsTier objected to IMI's requests for attorney's fees and costs. (R. Doc. 155, 156 & 166.) IMI never raised the issue of the possible prematurity of FirsTier's appeal. The court of appeals raised this issue *sua sponte.*

On March 3, 1989, the trial court entered its Order and Judgment and Memorandum Opinion, with findings of fact and conclusions of law. (App. to Pet. for Cert. pp. D-1, E-1 *et seq.*)[5] The Order and Judgment rendered judgment in favor of IMI and against FirsTier. *Id.* A copy of the docket sheet reflecting the entry of the trial court's Order and Judgment and Memorandum Opinion is printed as Appendix F to Petitioner's Petition for Writ of Certiorari.

Pursuant to F.R.A.P. 4(a)(2), FirsTier filed its Notice of Appeal on February 8, 1989. (J.A. p. 54.) No tolling motions, as described in F.R.A.P. 4(a)(4), were filed.[6] FirsTier's Notice of Appeal should have been treated as if it had been filed immediately after the court entered its order memorializing its decision on March 3, 1989. F.R.A.P. 4(a)(2).

On April 10, 1989, counsel for FirsTier received the court of appeals' letter dated April 5, 1989 directing counsel to brief the jurisdictional issues described therein. (App. to Pet. for Cert. p. B-1.)[7]

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[5] References to items printed in the Appendix to the Petition of a Writ of Certiorari will begin with "App. to Pet. for Cert." followed by the page number in the Appendix where the documents can be found.

[6] After the court of appeals questioned its jurisdiction, IMI began to characterize FirsTier's proposed findings as F.R.A.P. 4(a)(4) tolling motions. The trial court's suggestions to counsel and the record as a whole do not support IMI's new characterization.

[7] Pursuant to F.R.A.P. 4(a)(5), on April 14, 1989, counsel for FirsTier filed its Application for Extension of Time to File Notice of Appeal from the trial court's March 3, 1989 Entry of Judgment. (J.A. p. 55.) We believed that the court announced a final decision from the bench on January 26, 1989. However, if our

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered its order dismissing Appeal No. 89-6042 for lack of jurisdiction. The court of appeals found that "[t]he oral announcement by the district court on January 26, 1989, was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.)

SUMMARY OF ARGUMENT

The trial court's oral announcement disposed of all of the issues as to all of the parties in the case. The announcement was a final decision. The fact that the trial judge intended to prepare written findings of fact and a written journal entry of judgment does not preclude finality of his decision. F.R.A.P. 4(a)(2) recognizes the distinction between the announcement of a decision and the entry of a judgment. The court of appeals should have treated FirsTier's Notice of Appeal as if it were filed immediately after judgment was entered pursuant to F.R.A.P. 4(a)(2).

Even if the oral announcement was not a final decision, the court of appeals should have taken the appeal. The Federal Rules of Procedure should be construed liberally to maintain a party's right to an appeal, not to defeat it. By the time the court of appeals questioned appellate

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understanding of the court's intent was in error, the error was excusable. The trial court agreed and granted FirsTier an extension of time until May 1, 1989 in which to appeal from the court's order entered on March 3, 1989. (J.A. p. 57.) FirsTier filed its Notice of Appeal from the March 3, 1989 Order on April 25, 1989, resulting in 10th Circuit Appeal No. 89-6145. (J.A. p. 58.) IMI appealed from the trial court's F.R.A.P. 4(a)(5) grant of an extension of time in which to appeal, resulting in Appeal No. 89-6150. (R. Doc. 182.)

jurisdiction, the trial court had entered its written judgment which disposed of all of the issues as to all of the parties. Equally important, the record reflects that the court and the parties treated the decision as final. IMI showed/claimed no prejudice from the February 8, 1989 Notice of Appeal. The parties waived the requirement of a separate, written judgment, because FirsTier filed its notice of appeal after announcement of the trial court's decision pursuant to F.R.A.P. 4(a)(2), and IMI never raised the issue of appellate jurisdiction. Instead, the court of appeals raised the issue *sua sponte*.

There were no F.R.A.P. 4(a)(4) tolling motions. Instead, FirsTier, following the court's suggestion, filed objections to IMI's suggested findings of fact and its own proposed findings of fact. The record reflects that the parties and the court never characterized FirsTier's proposed findings and objections to IMI's suggested findings as F.R.A.P. 4(a)(4) tolling motions. It was not until the court of appeals questioned appellate jurisdiction that IMI took the new position that the proposed findings were "implied" tolling motions. IMI took this new position just to defeat FirsTier's valuable right to an appeal.

The record does not suggest that the trial court's Memorandum Opinion and Judgment impliedly overruled the implied motions. There simply were no implied motions to impliedly overrule.

ARGUMENT

PROPOSITION I

THE TRIAL JUDGE ANNOUNCED A FINAL DECISION FROM THE BENCH ON JANUARY 26, 1989

FirsTier's complaint sought enforcement of eight policies of private-mortgage-guaranty insurance plus punitive damages for IMI's bad-faith refusal to honor the insurance policies. On January 26, 1989, the trial court announced its decision that all of the policies "should be and are cancelled as void." Then the trial court said that FirsTier's claim for punitive damages was moot.[8] The court's bench announcement extinguished FirsTier's entire complaint. The court's decision disposed of all of the issues as to all of the parties in the case and was, therefore, an announcement of a final decision. *Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission of Kansas,* 753 F.2d 857 (10th Cir. 1985); *Sooner Products Company v. McBride,* 708 F.2d 510 (10th Cir. 1983); *Kasishke v. Baker,* 144 F.2d 384 (10th Cir. 1944). It has long been the rule that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233 (1945).

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[8] At the hearing on IMI's Motion for Summary Judgment, counsel for IMI recognized that FirsTier stated two causes of action: one for enforcement of the eight policies of insurance and a second for bad faith refusal to honor the policies. Counsel for IMI said that, if the court granted summary judgment on the issue of the enforceability of the policies, the court should also grant summary judgment on FirsTier's bad faith claim. (J.A. p. 18.)

A. As a Practical Matter, Trial Court's Announcement was a Final Decision. In *Gillespie v. U.S. Steel Corporation,* 379 U.S. 148 (1964), this Court gave a theme of practicality to the requirement of finality:

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this court has held that the requirement of finality is to be given a "practical rather than a technical construction."

As a practical matter, FirsTier's lawsuit against IMI was over when the court announced that the policies "should be and are cancelled. . . ." The court's decision was final and the court of appeals should have exercised jurisdiction over Appeal No. 89-6042 pursuant to F.R.A.P. 4(a)(2). See, e.g., *Acosta v. Louisiana Department of Health and Human Resources,* 478 U.S. 251, 254 (1986) (dicta); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 463 (7th Cir. 1988); *Budde v. Ling-Temco-Vought, Inc.,* 511 F.2d 1033, 1036-1037 (10th Cir. 1975).

The court of appeals dismissed Appeal No. 89-6042 because it found that "[t]he oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.) We do not know why the court of appeals thought the oral announcement was not a final decision.

IMI said the decision was not final because the trial court said that a memorandum opinion and judgment would follow its decision. IMI's argument, and the path chosen by the court of appeals, would render F.R.A.P. 4(a)(2) a nullity in a practical sense.

The 1979 amendment to F.R.A.P. 4(a)(2) recognizes the distinction between "announcement of a decision" and "entry of the judgment or order." The trial court also recognized the distinction when it announced its decision and told counsel that the decision would be followed by entry of a judgment. IMI's argument is inconsistent with F.R.A.P. 4(a)(2). The argument is also inconsistent with the record in this case.

B. Court and Parties Treated Announcement as Final Decision. In *United States v. F & M Schaefer Brewing Co.,* 356 U.S. 227 (1958), this Court looked to the record to determine whether the trial court's opinion constituted its final judgment in the case. In *Schaefer,* the trial court filed an opinion on April 14, 1955. Thereafter, on May 24, 1955, the trial court filed a document entitled "Judgment." On July 21, 1955, the petitioner filed its notice of appeal from the May 24, 1955 judgment. Respondent moved to dismiss the appeal as untimely, arguing that the April 14, 1955 opinion was the court's judgment. The court of appeals dismissed the appeal. 236 F.2d 889, 891. This Court reversed.

In *Schaefer,* this Court looked to the record to ascertain the intent of the court and of the parties to *maintain* the appeal. This Court emphasized the fact that the *respondent* presented the document entitled "Judgment" to the judge

for his signature. *Id.*, p. 229. This Court held that the opinion was not a "judgment" because the actions of all concerned — the court, the clerk, and counsel for the parties — indicated that none of them understood the opinion to be the final judgment in the case.

1. IMI Treated Decision as Final. This Court's reasoning in the *Schaefer* case should be used to maintain FirsTier's appeal. At the trial court level, IMI treated the trial court's announcement of its decision from the bench as a final decision on the merits. Two days after FirsTier filed its Notice of Appeal, IMI filed its Application for Award of Attorney's Fees and Bill of Costs. (J.A. pp. 30 & 34.) IMI's Bill of Costs is on a printed form. (R. Doc. filed February 10, 1989, unnumbered.) IMI revised the form (J.A. p. 34) to reflect that judgment was *announced* rather than entered, on January 26, 1989:

> "Judgment having been ~~entered~~ announced in the above entitled action on January 26, 1989. . . ."

Page 3 of IMI's Application for Attorney's Fees, filed on February 10, 1989, says: "IMI is clearly the prevailing party in the instant case since *judgment was entered in favor of IMI as a matter of law* and FirsTier took nothing by way of its Complaint." (J.A. p. 31.) (Emphasis added.) Also on page 3 of its Application For Attorney's Fees, IMI says that its Application is filed pursuant to Local Court Rule 6(E). (J.A. pp. 31 & 32.) The Rule in effect in 1989 provided that: "An application for costs, attorney's fees or both, submitted pursuant to this Rule shall be filed with the Clerk *not more than 15 days after the judgment is rendered (by notification or announcement of a decision)* or, in the alternative, not more than ten days after the formal entry of a written judgment, whichever is later." (Emphasis added.) Now the Rule says that an application for attorney's fees must be filed within 15 days after "*entry of judgment.*"

IMI's Motion For Attorney's Fees and Bill of Costs followed the trial court's announcement of its decision by exactly 15 days. Obviously, IMI thought the trial court announced a final decision on January 26, 1989. It filed its Application for Attorney's Fees on the date of the first deadline established by the local rules and before entry of the judgment.

IMI knows the difference between announcement of a final decision and entry of findings of fact and conclusions of law. This is further evidenced by its statements on page 5 of its Application for Attorney's Fees. (J.A. p. 32.) IMI asked that it "be granted leave to file a Supplementary Affidavit for additional attorney's fees within ten (10) days after this Court formally enters its Findings of Fact and Conclusions of Law." On March 15, 1989, IMI filed its Supplementary Application for Award of Attorney's Fees and Supporting Brief.[9] (J.A. p. 36.) On page 4 of its Supplementary Application; once again we see that IMI recognized the finality of the court's decision: "Counsel's efforts were obviously very suc-

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[9] In its response to FirsTier's Supplemental Brief filed in Appeal No. 89-6042, IMI said that its Supplementary Application was "protective" to assure that IMI's Application for Attorney's Fees was timely. IMI's statement is inconsistent with its statements on p. 4 of its Application for Attorney's Fees. (J.A. pp. 32 & 33.) IMI told the trial court that it wanted to file a Supplementary Application to cover its fees incurred in connection with preparation of the Attorney Fee Application and Findings of Fact and Conclusions of Law.

cessful considering that IMI's Motion For Summary Judgment was granted and FirsTier's claims were dismissed, thereby giving IMI a *complete and total victory."* (J.A. p. 39.) (Emphasis added.) The Affidavit of Mr. Eric S. Gray, Esq., attached to the Application, repeats that IMI "achieved a *complete and total victory* on Motion for Summary Judgment." (J.A. p. 44.) (Emphasis added.) The notations of time slip entries by Mr. Gregory F. Pilcher, Esq., an associate who worked on the file, also show that IMI thought that the court announced a final decision on January 26, 1989. Mr. Pilcher's January 26, 1989 time slip entry says, *inter alia:* "legal research re whether attorney fees are recoverable *by prevailing party."* (J.A. p. 49.) (Emphasis added.) On February 1, 1989, Mr. Pilcher made this entry: "Reviewed letter from client re publishing Court's Order. . . ." (J.A. p. 51.) On February 7, 1989, Mr. Pilcher made this entry: "Discussed procedure for publishing decisions with court clerk; drafted letters to Judge Bohanon requesting publication; Drafted letter to client explaining publication requirements." (J.A. p. 52.) IMI cannot seriously dispute that it thought the trial court announced a final decision on January 26, 1989.

2. Trial Court's Decision Meant to be Final. The trial court announced a final decision when it found that all of the policies "should be and are cancelled." (J.A. p. 27.) The trial court indicated his decision was final. When asked whether his ruling resulted in dismissal of both of FirsTier's causes of action, the judge said: "*That will be the ruling."* (J.A. p. 28.) (Emphasis added.)

After the court of appeals questioned jurisdiction, FirsTier filed an Application for Extension of Time to File Notice of Appeal. (J.A. p. 55.) In support of the Application, FirsTier said:

> We have recently learned that the Court of Appeals may be uncertain as to whether this court made a final decision in which it disposed of all of the issues as to all the parties, when it made its announcement on January 26, 1989. We believe that the Court's decision was final on that date. However, if our understanding of the Court's intent was in error, the error was excusable. . . .

IMI objected to FirsTier's Application. (R. Doc. 175.) The trial court agreed with FirsTier and granted FirsTier's Application. (J.A. p. 57.) As in the *Schaefer* case, the record reveals that the court and counsel for the parties understood that the trial court's oral announcement was a final decision. This Court should consider the court's and the parties' intentions and understandings to maintain FirsTier's appeal.

C. Entry of Judgment Not Essential to Final Decision. IMI advocates a mechanical application of the "separate-document" provision of F.R.C.P. 58 to defeat FirsTier's appeal. IMI's approach is inconsistent with the purpose of the 1963 amendment to F.R.C.P. 58 which contained the new "separate-document" rule. It is true, as explained by this Court in *United States v. Indrelunas,* 411 U.S. 216, 222, 223 (1973), that the rule is to be "mechanically applied" to avoid uncertainties over when a judgment is entered. But, in *Indrelunas,* this Court applied the separate-document provision to *maintain* an appeal. "The rule should be interpreted to prevent loss of the

right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386 (1978). It is inconsistent with the purposes of the rule to apply it mechanically to *defeat* an appeal.

In *Bankers Trust,* this Court assumed, without so deciding, that the requirements of the Federal Rules of Civil Procedure for an effective judgment must be satisfied before §1291 jurisdiction may be invoked. *Id.* at 384, 385. In footnote 4, this Court gave the basis for its assumption:

> A "judgment" for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a "final decision" as that term is used in 28 U.S.C. §1291. Federal Rule Civ. Proc. 54(a), for example, provides that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." See also *Ex parte Tiffany,* 252 U.S. 32, 36, 40 S.Ct. 239, 240, 64 L.Ed. 443 (1920); 6A J. Moore, Federal Practice 58.02, pp. 51-52 (1972). Because Rule 58 provides that a "judgment is effective only . . . when entered as provided in Rule 79(a)," it is arguable that a decision must be entered on the civil docket before it may constitute a "final decision" for purposes of §1291. Unlike the separate-document requirement, however, the keeping of a civil docket pursuant to Rule 79 fulfills a public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it. A judgment of dismissal was entered in this case below. See n. 1, *supra.*

After *Bankers Trust,* F.R.A.P. 4(a)(2) was amended. With the 1979 amendment to F.R.A.P. 4(a)(2), it is clear that the Rules recognize the difference between announcement of a decision and entry of a judgment. In this case, the record

reflects that the court and counsel for both parties treated the court's bench announcement as a final decision.

IMI now says that the trial court's decision was not final because the trial court retained power to amend its judgment. (Brief of Respondent p. 17.) Of course, the Rules expressly recognize the retention of such power. *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 450 (1981). But it does not follow that the retention of such power precludes announcement of a final decision. If that were so, we could never have a final decision until after passage of the time to file post-decisional motions. IMI's approach would turn appellate practice on its head.

F.R.A.P. 4(a)(2) is virtually identical to F.R.A.P. 4(b) which governs appeals in criminal cases. F.R.A.P. 4(b) provides that, in criminal cases, a "notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof." The Tenth Circuit recently considered F.R.A.P. 4(b) under circumstances virtually identical to this case in *United States of America v. Green,* 847 F.2d 622 (10th Cir. 1988).

In *Green,* the criminal defendant moved for dismissal of an indictment. On October 18, 1985, the court denied his motion. On the same day, the defendant entered, and the court accepted, a

conditional plea of guilty. Ten days later, the defendant filed his notice of appeal. Finally, on December 5, 1985, the court sentenced the defendant and entered its order of judgment.

The Tenth Circuit found that the saving provision in F.R.A.P. 4(b) allowed the defendant's notice of appeal to ripen after the court's judgment was finalized and entered. In reaching this conclusion, the court cited *United States v. Moore*, 616 F.2d 1030 (7th Cir. 1980), *cert. den.*, 446 U.S. 987, a case in which the Seventh Circuit assessed the impact of the 1979 amendments adding the saving provision to civil appeals in F.R.A.P. 4(a). The court in *Green* said, *inter alia*, that the purpose of establishing a saving provision for premature notices of civil appeals was to "extend to civil cases the provisions of Rule 4(b) dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely." *Green*, p. 624, quoting from Advisory Committee on Appellate Rules, 1979 Amendment, Note to Subdivision 4(a)(2).

As a practical matter, FirsTier's lawsuit was over when the trial court cancelled all of the insurance policies and dismissed FirsTier's action for punitive damages. The trial court and counsel for the parties treated the trial court's announcement as a final decision. The court of appeals should have recognized the finality of the trial court's decision. The court of appeals should have treated FirsTier's February 8, 1989 notice of appeal as if it had been filed immediately after the judgment was entered.

PROPOSITION II

EVEN IF THE TRIAL COURT'S ANNOUNCEMENT WAS NOT A FINAL DECISION, THE NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED AFTER ENTRY OF THE ORDER, SINCE IMI CAN SHOW NO PREJUDICE

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court considered an arguably premature notice of appeal. The district court entered judgment on December 19, 1960, dismissing the petitioner's complaint for failure to state a claim. On December 20, 1960, the petitioner moved to vacate the judgment and to amend the complaint. On January 17, 1961, the petitioner filed her notice of appeal from the December 19, 1960 judgment. On January 23, 1961, the district court denied the petitioner's motions to vacate the judgment and to amend her complaint. Finally, on January 26, 1961, the petitioner filed a second notice of appeal from the district court's denial of her motions.

In *Foman*, the court of appeals raised the issue of appellate jurisdiction *sua sponte*. The court of appeals dismissed the appeal from the December 19, 1960 judgment as premature because of the pendency of the petitioner's Rule 59 motion. The court of appeals said that the second notice of appeal was ineffective to review the December 19, 1960 judgment because it did not specify that judgment.

In *Foman*, this Court said that even if the first notice of appeal was premature, the court of appeals was in error in so narrowly reading the second notice. This Court recognized that the

defect in the second notice of appeal did not prejudice or mislead the respondent because respondent received the first notice of appeal and knew that the petitioner intended to seek review of both the dismissal order and the order overruling her motions. This Court said:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L. Ed.2d 80. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

A. IMI Not Prejudiced by "Early" Appeal. As in the *Foman* case, IMI can show no prejudice from FirsTier's first notice of appeal, even assuming that the notice of appeal was premature. IMI also treated the trial court's oral announcement as a final decision. As in the *Foman* case, the court of appeals raised the issue of appellate jurisdiction *sua sponte.* It was not until after the court of appeals raised the jurisdictional issue that IMI began to suggest that FirsTier's first notice of appeal was ineffective. IMI is just taking this new position to defeat FirsTier's valuable right to an appeal.

Under F.R.A.P. 4(a)(1), a notice of appeal in a civil case must be filed within thirty (30) days after the entry of the judgment from which the

appeal is taken. The thirty (30) day time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1978). However, this jurisdictional requirement must be considered in connection with the purpose of the rule. In *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 264 (1978) this Court said:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end unless within that time the prescribed application has been made; if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

A strict application of the rule made sense in the *Browder* case. In *Browder,* the petitioner maintained, consistently, that the court of appeals lacked jurisdiction because the respondent's notice of appeal was filed approximately 90 days after the entry of a final order.[10] But a strict application of the rule in our case would not serve the purpose of the rule because IMI received FirsTier's notice of appeal within 12 days after the trial court announced its decision. IMI knew that it was *not* "free of FirsTier's demands." *Browder, supra.*

B. Findings of Fact and Conclusions of Law Not Jurisdictional Prerequisite for Appellate Review. IMI consistently argues that the trial court's decision was not final because the court said that a memorandum opinion and judgment

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[10] Respondent filed a post judgment motion which was arguably a "tolling" motion. However, respondent's motion was untimely.

would follow its oral announcement. Findings of fact and conclusions of law are not a prerequisite to appellate review of a decision granting summary judgment. F.R.C.P. 52. They are not a prerequisite to appellate jurisdiction. *Featherstone v. Barash,* 345 F.2d 246 (10th Cir. 1965); *First National Bank of Fort Smith, Arkansas v. Mattingly,* 312 F.2d 603 (10th Cir. 1962).

The trial court's oral findings and conclusions announced at the end of the January 26, 1989 hearing were sufficient to indicate the basis of the trial judge's opinion. Even in the absence of a formal judgment, the oral findings would have provided an adequate basis for appellate review. F.R.C.P. 52; *Milliner v. Government of the Virgin Islands,* 593 F.2d 532 (3rd Cir. 1979).

C. Rules Should be Interpreted to Maintain Appeals.

Even prior to the 1979 amendment to F.R.A.P. 4(a), this Court recognized that the requirement of a separate document in F.R.C.P. 58 is not intended to be such a categorical imperative that the parties are not free to waive it. *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). In *Bankers Trust,* the district court entered a memorandum opinion. Although the court did not enter a separate document entitled "judgment," the record reflected that both the parties and the trial court assumed that the case had been dismissed. The court of appeals raised the issue of appellate jurisdiction *sua sponte.* The court of appeals decided that because the trial court and the parties treated the memorandum opinion as a final judgment, the appellate court had jurisdic-

tion to consider the appeal despite the absence of a separate judgment. This Court agreed. The Court said at p. 385:

> The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered. See *United States v. Indrelunas,* 411 U.S. 216, 220-222, 93 S.Ct. 1562, 1564-1565, 36 L. Ed.2d 202 (1973). Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment.

In *Bankers Trust,* this Court recognized that certainty as to the timeliness of an appeal does not prevent the parties from waiving the separate judgment requirement. The Court, quoting from Professor Moore, said at p. 386: *"The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss."* (Emphasis added.)

The Tenth Circuit Court of Appeals has interpreted the Federal Rules of Procedure to defeat FirsTier's right to appeal. The purpose of the Rules, as announced by this Court, makes it clear that they should be interpreted to maintain a party's right to an appeal, not to defeat it. The separate-document requirement should be applied mechanically only if such an interpretation maintains an appeal. However, the parties

may also waive the requirement if the waiver maintains the appeal. *Indrelunas, supra; Bankers Trust, supra.* See dissenting opinion in *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966 (1986).

In this case, the parties waived the separate-document requirement. Within exactly fifteen (15) days after the announcement of the trial court's decision, IMI filed its Motion for Attorney's Fees and Bill of Costs. The Bill of Costs says that judgment was *announced* on January 26, 1989. In its Motion for Attorney's Fees, IMI repeatedly characterized itself as the prevailing party. IMI did not raise the jurisdictional issue. Instead, the court of appeals raised the issue *sua sponte*. IMI has never attempted to explain how it would be prejudiced by FirsTier's February 8, 1989 appeal.

IMI now takes a new position. It advocates a strict interpretation of the Federal Rules of Procedure, in order to defeat FirsTier's valuable right to an appeal. Such a strict technical construction of the rules is contrary to the spirit of decisions of this Court and of the rules themselves. Even if the trial court's oral announcement was not a final decision, the court and the parties treated it as such and the court of appeals should have taken jurisdiction. *Bankers Trust, supra.*

In its Response Brief to FirsTier's Petition for Certiorari, IMI says that *Bankers Trust* does not apply because the clerk did not enter judg-

ment on the docket. (Brief of Respondent p. 12.) IMI's argument is inconsistent with F.R.A.P. 4(a)(2). IMI's argument is also inconsistent with the purpose of a civil docket. The keeping of a civil docket is a "public record keeping function." *Bankers Trust*, f.n. 4, p. 1119. Its purpose is separate from the purpose of a separate document, which gives notice to the losing party that judgment has been entered against it. *Id.* In our case, the trial court's oral announcement notified the parties of his decision. The fact that the clerk did not enter a "judgment" on a docket does not destroy the finality of the court's decision.

D. IMI's Case Law Authorities Do Not Apply. In its Response Brief to FirsTier's Petition for Certiorari, IMI quotes at length from *Carnes v. United States*, 279 F.2d 378 (10th Cir. 1960), for the proposition that the trial court's announcement was not a final decision because the court intended to enter a formal, written judgment. *Carnes* was decided prior to the 1963 amendment to F.R.C.P. 58.[11] The 1963 amendment to F.R.C.P. 58 made it clear that every judgment is effective only when set forth on a separate document and entered on the clerk's judgment docket. *Carnes* does not stand for the proposition that a trial court's announcement of its intention to enter written findings of fact and conclusions of law precludes finality of his announcement of a de-

[11] The *Carnes* decision has recently been questioned because it pre-dates the 1963 revision of F.R.C.P. 58. *Ferguson v. International Association of Bridge, Structural and Ornamental Iron Workers*, 854 F.2d 1169 (9th Cir. 1988). Its applicability to this case is also questionable.

cision on the merits. Instead, relying on the *Schaefer Brewing Company* case, the court in *Carnes* looked at the judge's intent and the parties' intent to *maintain* the appeal.[12]

IMI also cites *Century Laminating, Ltd. v. Montgomery,* 585 F.2d 563 (10th Cir. 1979), *cert. dismissed,* 444 U.S. 987 for the proposition that a judgment is not final where the trial court has power to further review the judgment.[13] Trial courts always have that power for a period of time, even after entry of judgment. *White, supra. Century Laminating* also does not apply to this case. In *Century Laminating,* the notice of appeal was premature because it was filed while a motion for J.N.O.V. and a motion for an injunction were pending. No. F.R.A.P. 4(a)(4) motion was pending in this case when FirsTier filed its notice of appeal.[14]

Another case cited by IMI is *General Television Arts, Inc. v. Southern Railway Co.,* 725 F.2d 1327 (11th Cir. 1984). *General Television's* facts

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[12] In *Carnes,* the court announced a decision from the bench on May 2, 1958. Sixteen months later, the court filed its findings of fact and conclusions of law. *Carnes* appealed from the written order. The court of appeals found that the notice of appeal from the written order was effective, because the record reflected that the trial court intended to enter a written order after it made its bench announcement. If *Carnes* applies at all, it supports FirsTier.

[13] The Tenth Circuit has recognized that, although *Century Laminating, Ltd.* pre-dates the 1979 amendment of F.R.A.P. 4(a), nevertheless, the case aptly expresses the rationale supporting the ongoing nature of proceedings when an F.R.A.P. 4(a)(4) motion is pending. *Federal Savings & Loan Insurance Corporation v. Huff,* 851 F.2d 316 (10th Cir. 1988).

[14] *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968), also cited by IMI, is also inapplicable. There, the 10th Circuit held that a Rule 59(b) motion, filed before entry of a judgment, suspended the time for filing a notice of appeal pursuant to Rule 73(a). If *Director of Revenue* applies

make it inapplicable to this case. *General Television* involved a notice of appeal filed after the trial court had entered a *partial* summary judgment on liability only.[15] In *General Television,* appellant tried to appeal from an interlocutory order. In our case, when the trial court announced its decision from the bench, it disposed of FirsTier's entire complaint on the merits. Even IMI said so at the trial court level. It repeatedly characterized itself as the prevailing party on the merits in its Motion for Attorney's Fees and Bill of Costs. The only purpose of IMI's change of position is to defeat FirsTier's appeal.

E. Court of Appeals' Decision Inconsistent With Tenth Circuit's "Forgiving Attitude" Toward Early Appeals. The Tenth Circuit Court of Appeals has recently adopted a "forgiving attitude" toward premature notices of appeal. *Federal Savings & Loan Insurance Corporation v. Huff,* 851 F.2d 316 (10th Cir. 1988); *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641 (10th Cir. 1988). Both

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to this case at all, it supports FirsTier. In *Director of Revenue,* the court recognized that the rules must be liberally construed to promote the consideration of appeals on the merits. *Id.,* page 309. The court construed the rules and the record below to *sustain* the appeal.

[15] IMI cites four other cases which do not apply here because they concern appeals from non-appealable orders: *United States v. Hansen,* 795 F.2d 35, 38 (7th Cir. 1986) (Notice of appeal was filed before a final judgment was either announced or entered); *Robinson v. Tanner,* 798 F.2d 1378, 1382-83 (11th Cir. 1986) (Discovery orders are non-final and non-appealable); *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338 (10th Cir. 1977) (Discovery orders are non-final and non-appealable) and *Euziere v. United States,* 266 F.2d 88 (10th Cir. 1959) (Order vacating criminal conviction and reinstating case for trial is non-final and non-appealable). The other case relied upon by IMI, *Osterneck v. E.T. Barwick Ind., Inc.,* 825 F.2d 1521, 1527 (11th Cir. 1987), aff'd sub nom. *Osterneck v. Ernst & Whinney,* _____ U.S. _____ , 109 S.Ct. 987 (1987) does not apply because it concerns an appeal filed while a Rule 59(e) motion was pending.

FSLIC v. Huff and *Lewis v. B.F. Goodrich* were cases which, unlike ours, involved multiple claims, part of which were not adjudicated when the notice of appeal was filed. However, before the circuit dismissed the appeal, the district court had adjudicated all outstanding claims. The court found that F.R.A.P. 4(a)(2) permits the interpretation that the notice of appeal filed prematurely ripens and saves the appeal when all of the claims are finally adjudicated. And in *Lewis*, the court adopted the following approach:

> When the district court case is still ongoing at the time the appeal reaches this court's attention, two possibilities arise. One is that a belated Rule 54(b) certification has been obtained. In this situation, if the appellant obtains a 54(b) certification after the notice of appeal was filed, we will deem the notice of appeal to ripen as of the date of certification and will accept the jurisdiction pursuant to the savings provisions of Fed. R. App. P. 4(a)(2). The other possibility is that no Fed. R. Civ. P. 54(b) certification has been obtained. For this, we hereby adopt the practice of notifying the parties of our observation of our apparent jurisdictional defect and giving them a date certain by which to secure Rule 54(b) certification or an order or judgment explicitly adjudicating all remaining claims. If no certification, or final, dispositive adjudication, is obtained and presented to this appellate court by the specified date, the case will be dismissed summarily for lack of appellate jurisdiction.

In our case, the court of appeals directed the parties to file briefs on the jurisdictional issues by April 26, 1989. (App. to Pet. for Cert. p. B-1.) By

the time the briefs were due and filed, the trial court had disposed of all remaining claims by written judgments which were entered on the docket. On March 3, 1989, the trial court entered its Order and Memorandum Opinion with findings of fact and conclusions of law sustaining IMI's motion for summary judgment and disposing of FirsTier's entire Complaint. (App. to Pet. for Cert. pp. D-1, E-1.) On April 6, 1989, the trial court entered its written order granting IMI attorney's fees. (R.Doc. 170.)[16] The trial court made a final, dispositive adjudication of all claims in the case. The court of appeals' decision is inconsistent with its own recently adopted approach to F.R.A.P. 4(a)(2). Even when the oral decision fails to dispose of all issues as to all parties in the case, the Tenth Circuit has held that the premature notice of appeal ripens when a final order disposing of all issues is subsequently entered.

F. Other Circuits Also Forgive Early Appeals. Our court of appeals' decision is also in conflict with decisions of other circuits. See, e.g., *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988) (Court of Appeals has power to take premature appeal where prematurity was cured shortly after filing notice of appeal by subsequently entered order). The Third Circuit noted the division in the circuit courts on this issue in *Dowling, supra*, footnote 2, page 138. See also *Sacks v. Rothberg*, 845 F.2d 1098 (D.C. Cir. 1988) (Premature notice of appeal vests court of ap-

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[16] On April 12, 1989, FirsTier filed a notice of appeal from the trial court's order awarding defendant its attorney's fees resulting in Tenth Circuit Appeal No. 89-6128. (R. Doc. 171.)

peals with jurisdiction once district court disposes, finally, of all matters pending before it, citing case law in accord from the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits); *Rivers v. Washington County Board of Education,* 770 F.2d 1010 (11th Cir. 1985) (Motion to amend judgment filed after notice of appeal to reflect a final disposition of all claims as to all parties treated as a Rule 60, not a Rule 59 motion. Pursuant to F.R.A.P. 4(a)(2), notice of appeal deemed filed after entry of amended judgment.)

In *Diamond by Diamond v. McKenzie,* 770 F.2d 225 (D.C. Cir. 1985), the appellate court took jurisdiction despite the fact that a separate judgment had never been entered. Relying on *Bankers Trust,* the court construed the rules to maintain the appeal. The court said that the appellees, in effect, waived the separate judgment requirement because "it was this court, not the appellees, which raised the issue in the first instance." *Id.* p. 231. Appellees were unable to show that they were prejudiced by the lack of a separate document. *Id.* Lack of prejudice to the appellee was also noted as a factor to support appellate jurisdiction in *Knight v. Brown Transport Corp.,* 806 F.2d 479 (3rd Cir. 1986) (Premature notice of appeal taken from order which disposes of some but not all issues takes effect when order is amended to dispose of all issues, citing F.R.A.P. 4(a)(2), in the absence of a showing of prejudice to appellee), and in *Freeman v. Hittle,* 747 F.2d 1299 (9th Cir. 1984) (Certification of one of multiple issues for appeal was sufficient to validate premature notice of appeal, in absence of prejudice to appellee).

The trial court announced its decision to dispose of FirsTier's entire Complaint on January 26, 1989. The trial court's announcement was a final decision within the meaning of 28 U.S.C. §1291. On March 3, 1989, the trial court memorialized its decision in an order and judgment, with findings of fact and conclusions of law in a memorandum opinion. Even if the oral announcement was not a final decision, FirsTier's Notice of Appeal should have been deemed to be filed on March 3, 1989. F.R.A.P. 4(a)(2). The parties and the court treated the oral announcement as if it were a final decision and waived other technicalities. It was not until the court of appeals questioned appellate jurisdiction that IMI even began to suggest to the contrary. The court of appeals should have accepted jurisdiction pursuant to the saving provision of F.R.A.P. 4(a)(2).

PROPOSITION III

THERE WERE NO F.R.A.P. (4)(a)(4) TOLLING MOTIONS

At the conclusion of the January 26, 1989 hearing, the trial court asked counsel for IMI to submit suggested findings of fact and conclusions of law as to each of the loans. Then, addressing counsel for FirsTier, the court said "within five days you may file with the court your objection or suggestion *wherein you find that the suggestions of [counsel for IMI] are in error,* if you care to do so." (Emphasis added.) (J.A. p. 27.) On February 13, 1989, FirsTier filed its objection to IMI's suggested findings and its own proposed findings. Counsel for FirsTier did this to protect the record. Now IMI wants to characterize Firs-

Tier's proposed findings of fact and objections to IMI's suggested findings of fact as a request under F.R.C.P. 52(b) to make additional findings of fact or as an F.R.C.P. 59 motion to alter the trial court's January 26, 1989 judgment. IMI's characterization of the "implied motions" is unsupported by local practice and the record.

IMI repeatedly says that FirsTier's suggested findings assail the decision announced by the trial court. However, it is clear from the record that FirsTier was not asking the trial court to change his mind. FirsTier's objection says that FirsTier "objects to the suggested findings of fact and conclusions of law submitted by defendant, Investor's Mortgage Insurance Co., ("IMI"). . . ." (Brief for Respondent p. A-1.) FirsTier was not assailing the findings of the trial court at all. The trial court had not entered its memorandum opinion with findings of fact and conclusions of law when FirsTier filed its objection and suggested findings. How could FirsTier object to findings which did not yet exist?

F.R.C.P. 8(f) says that "all pleadings shall be so construed as to do substantial justice." IMI's characterization of the "implied motions" violates the spirit of the Federal Rules of Procedure. IMI's characterization would not result in substantial justice.

IMI's characterization is also inconsistent with local practice. Western District of Oklahoma Local Rule 14(A) says: "Any motion, application or objection which is not opposed in 15 days, as set out above, *shall* be deemed confessed." (Emphasis added.) If FirsTier's suggested findings and objections to IMI's suggested

findings were, in fact, F.R.C.P. 59 or 52 motions, IMI's written response to the "implied motions" would have been due by February 28, 1989. No such response is in the record. IMI would not have taken the risk of allowing its judgment to be overturned by default if IMI really thought that FirsTier had filed a "motion" under F.R.C.P. 52 or 59.[17] *Now IMI has changed its position in an attempt to defeat FirsTier's valuable right to an appeal.*

F.R.C.P. 52 recognizes the distinction between proposed findings of fact and conclusions of law and Rule 59 and Rule 52(b) tolling motions. The Rule addresses findings of fact and conclusions of law in subparagraph (a), and the tolling motions are addressed separately in subparagraph (b). In this case, the court and counsel for the parties also recognized the distinction. There is nothing in the record to suggest that anyone ever thought that FirsTier's suggested findings of fact and objection to IMI's suggested findings of fact were tolling motions. IMI adopted its new position only after the court of appeals questioned jurisdiction. IMI's new position is contrary to the spirit of the Federal Rules of Procedure, recent decisions of this Court and the record. IMI's new position should not be adopted by this Court to defeat FirsTier's appeal.

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[17] At page 20 of its Brief for Respondent, IMI says that FirsTier's suggested findings of fact and conclusions of law and objections to IMI's suggested findings of fact and conclusions of law "*must* be categorized either as a request under Rule 52(b) to amend or make additional findings of fact or a request under Rule 59(e) to alter or amend the judgment." (Emphasis added.) If that is so, then this Court should direct the trial court that it "must" grant FirsTier's "implied motions" by default for IMI's failure to timely respond pursuant to Local Rule 14.

PROPOSITION IV

TRIAL COURT'S MEMORANDUM OPINION AND ORDER DID NOT IMPLIEDLY OVERRULE IMPLIED MOTIONS

IMI also wants this Court to find that the trial court "impliedly overruled" FirsTier's "implied motions" which seek to alter the trial court's "implied interlocutory order." An appellate court must examine the entire record and the judgment itself to determine whether the judgment impliedly overrules all pending motions. See, e.g., *Lewis v. U.S. Postal Service,* 840 F.2d 712 (9th Cir. 1987); *Calculator's Hawaii, Inc. v. Brandt, Inc.* 724 F.2d 1332 (9th Cir. 1982). There is nothing in the record which indicates that either the trial court, FirsTier or IMI intended to treat FirsTier's proposed findings and objections to IMI's suggested findings as F.R.C.P. 52 and F.R.C.P. 59 motions. The record does not show that IMI responded to the "implied motions" or that the trial court ruled on the "implied motions."

IMI characterizes FirsTier's suggested findings as implied F.R.A.P. 4(a)(4) tolling motions. However, unless the trial court has ruled on the tolling motions, this Court could still preserve FirsTier's right to appeal by remanding the case to the trial court to rule on the implied tolling motions. *Bankers Trust, supra,* p. 385.[18] To avoid that possibility, IMI also wants this Court to infer that the trial court overruled the implied motions.

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[18] Of course, FirsTier does not advocate such a result. "Wheels would spin for no practical purpose." *Bankers Trust, supra,* p. 385.

IMI's argument stretches the record too thin. The argument also violates the spirit of the decisions of this Court and of the Federal Rules of Procedure. This Court should examine the record to determine the parties' and the court's intentions to maintain the appeal, not to defeat the appeal. In this case, there simply were no implied motions to impliedly overrule.[19]

CONCLUSION

The path chosen by the Tenth Circuit Court of Appeals would, in effect, render F.R.A.P. 4(a)(2) a nullity. IMI's position and the decision of the court of appeals are contrary to the spirit of the decisions of this Court and of the Federal Rules of Procedure. The Federal Rules of Procedure should be liberally construed to maintain a party's right to an appeal, not to defeat it. The court of appeals should have treated FirsTier's February 8, 1989 Notice of Appeal as if it were filed immediately after entry of the Memorandum Opinion and Order. F.R.A.P. 4(a)(2). This Court should reverse the decision of the court of appeals and remand this appeal to the circuit court for reinstatement.

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[19] IMI cites *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968), as authority for the proposition that the trial court's March 3, 1989 Order impliedly overruled the implied motions. *Director of Revenue's* facts make it inapplicable. There, the court liberally construed the rules to maintain the appeal. The court said that the pendency of a tolling motion before entry of a journal entry, and an order overruling the motion *after* entry of the journal entry *extended* the time for appeal. *Id.* pp. 308, 310. The court *expressly* overruled the tolling motion in a separate order. The other case cited by IMI for this proposition is *Agostino v. Ellamar Packing Co.,* 191 F.2d 576 (9th Cir. 1951). *Agostino* is also factually distinct. The trial court *expressly* denied the motion by a minute order.

Respectfully submitted,

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No. 89-1063

In The

Supreme Court of the United States

October Term, 1989

FIRSTIER MORTGAGE CO., a/k/a
REALBANC, INC.,

Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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37

QUESTIONS PRESENTED

1. Whether the January 26, 1989 oral announcement was a final decision in light of the fact that the Court requested Respondent to submit suggested findings of fact and conclusions of law, that the Court then allowed Petitioner a specified period of time to respond to the suggested findings and conclusions, and that the Court then indicated it would modify, add to, or delete and enter its own findings of fact and conclusions of law and judgment?

2. If the January 26, 1989 oral announcement was not a final decision, whether Petitioner's premature notice of appeal may be considered as if taken from the trial court's subsequently announced final order?

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

LEGAL ARGUMENTS AND AUTHORITIES 8

PROPOSITION I

THE JANUARY 26, 1989 ORAL ANNOUNCEMENT WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED TO AND DID FOLLOW THE ORAL ANNOUNCEMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT 8

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL, FILED BEFORE ANNOUNCEMENT OF A FINAL DECISION, IS PREMATURE AND INEFFECTIVE TO INVOKE APPELLATE JURISDICTION 13

A. THE REQUIREMENT FOR A TIMELY NOTICE OF APPEAL IS MANDATORY AND JURISDICTIONAL 13

B. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 15

1. Rule 4(a)(2) applies only when a notice of appeal is filed after announcement of a final decision 15

2. Rule 4(a)(2) is intended to validate appeals filed after announcement of a final decision but before the decision is entered 17

TABLE OF CONTENTS – Continued

Page

3. Rule 4(a)(2) should not be construed to validate appeals from interlocutory orders or nonfinal announcements because such a construction would result in both the reviewing court and the trial court simultaneously reviewing the same announcement. 19

4. Courts hold that Rule 4(a)(2) is not applicable to appeals taken from interlocutory orders 22

C. CASE LAW APPLYING RULE 4(a)(2) TO PREMATURE APPEALS FILED AFTER A FINAL DECISION ON SOME BUT NOT ALL CLAIMS IS INAPPOSITE TO THIS CASE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 23

PROPOSITION III

BANKERS TRUST CO. V. MALLIS IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986) 20

Alcom Electronic Exchange, Inc. v. Burgess, 849 F.2d 964 (5th Cir. 1988) 26, 27

Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) ..... *passim*

Campbell Industries v. Logistics Int'l, Inc., 816 F.2d 1401 (9th Cir. 1987) 12

Carnes v. United States, 279 F.2d 378 (10th Cir. 1960), *cert. denied* 364 U.S. 846 (1960) 11, 12

Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945) 8, 9

Century Laminating, Ltd. v. Montgomery, 595 F.2d 563 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979) 8, 13, 26

Diamond v. McKenzie, 770 F.2d 225 (D.C. Cir. 1985) 24

Dowling v. City of Philadelphia, 855 F.2d 136 (3rd Cir. 1988) 24

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) 14

Freeman v. Hittle, 747 F.2d 1299 (9th Cir. 1985) 24

TABLE OF AUTHORITIES – Continued

Page(s)

General Television Arts, Inc. v. Southern Railway Co., 725 F.2d 1327 (11th Cir. 1984) 22, 23

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1978) 14, 19, 20, 21

Jones v. Celotex Corp., 857 F.2d 273 (5th Cir. 1988) ... 24, 28

Knight v. Brown Transport Corp., 806 F.2d 479 (3rd Cir. 1986) 24

Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988) 25

Maryland Casualty Co. v. Conner, 382 F.2d 13 (10th Cir. 1967) 14

Osterneck v. E. T. Barwick Ind., Inc., 825 F.2d 1521 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987) 22, 26

Rivers v. Washington County Bd. of Educ., 770 F.2d 1010 (11th Cir., 1985) 24

Robinson v. Tanner 798 F.2d 1378 (11th Cir. 1986), *cert. denied* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987) 22, 23, 25, 26, 27

Sacks v. Rothberg, 845 F.2d 1098 (D.C. Cir. 1988) 24

Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) 14

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958) .. 8, 9, 11

United States v. Green, 847 F.2d 622 (10th Cir. 1988) 26

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Hansen, 795 F.2d 35 (7th Cir. 1986) 19, 22, 23, 25

United States v. Taylor, 632 F.2d 530 (5th Cir. 1980) 26

STATUTES

28 U.S.C. §1291 ..... *passim*

28 U.S.C. §2107 ..... 1, 7, 13, 14, 28

OTHER

Fed. R. App. P. 1(b) 1, 18

Fed. R. App. P. 4(a)(1) 1, 13, 14

Fed. R. App. P. 4(a)(2) ..... *passim*

Fed. R. App. P. 4(a)(4) 2, 20, 21

Fed. R. Civ. P. 52(b) 20

Fed. R. Civ. P. 54(a) 17

Fed. R. Civ. P. 54(b) 22, 24, 25

Fed. R. Civ. P. 58 ..... 5, 12, 17, 18, 24, 28

Fed. R. Civ. P. 79(a) 5, 17, 18, 24

Fed. R. Crim. P. 11(a)(2) 26

Notes of Advisory Committee on Rules, following 28 U.S.C.A. Fed. R. Civ. P. 58, at page 642 27

9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶204.14 at 4-128 – 4-129 (2d ed. 1990) 16

STATUTORY PROVISIONS AND APPELLATE RULES INVOLVED

1. 28 U.S.C. §1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. 28 U.S.C. §2107 provides, in relevant part:

Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

3. Fed. R. App. P. 1(b) provides:

Rules Not to Affect Jurisdiction

These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

4. Fed. R. App. P. 4(a)(1) provides:

In a civil case in which an appeal is permitted by law as of right from a district court to a court

of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

5. Fed. R. App. P. 4(a)(2) provides:

Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

6. Fed. R. App. P. 4(a)(4) provides:

If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

STATEMENT OF THE CASE

The Petitioner, FirsTier Mortgage Co. ("FirsTier") commenced this litigation when it brought suit to recover on eight policies of private mortgage insurance which were underwritten by the Respondent, Investors Mortgage Insurance Co. ("IMI")[1]. FirsTier alleged two causes of action. One sounded in contract and one purportedly sounded in tort for breach of the alleged duty of good faith and fair dealing. J.A. 4-7.[2] The trial court's jurisdiction was grounded on 28 U.S.C. §1332. IMI moved for summary judgment on the grounds that the policies were void and unenforceable because of fraud and/or material misrepresentations made by or in behalf of FirsTier in the insurance applications. R. Doc. 106.[3]

On January 26, 1989 the trial court heard oral argument on IMI's Motion For Summary Judgment. After hearing oral argument, the trial court stated that "the policies should be and are cancelled as void for want [sic] of fraud, bad faith." J.A. 27. The trial court requested that IMI submit suggested findings of fact and conclusions of law. *Id*. The trial court specifically advised the parties that

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[1] IMI's parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates are: Investors Mortgage Insurance Holding Company; Investors Equity Insurance Company, Inc.; Financial Products and Services, Inc. (formerly Investors Conduit Corp.); and Investors Mortgage Financial Services, Inc.

[2] References to the Joint Appendix will be designated "J.A." followed by the page number in the Joint Appendix.

[3] References to the record below will be designated "R. Doc." followed by the document number reflected on the docket sheet.

after giving FirsTier an opportunity to show the Court where IMI's suggested findings and conclusions were in error, the trial court would write its own findings of fact and conclusions of law *and judgment*. *Id.* The trial court said:

> The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.
>
> . . .
>
> And if Mr. Dawson cares to do so, within five days you may file with the Court your objections or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

Id.

On February 8, 1989, FirsTier filed a Notice of Appeal from the January 26, 1989 oral announcement. Subsequently, on February 13, 1989, FirsTier filed what it called its "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law." App. to Opp. to Cert. A-1.[4] FirsTier's "Objection" controverts virtually every suggested finding and conclusion submitted by IMI. In fact, FirsTier's "Objection" concludes with the assertion that "IMI is not entitled to summary judgment." *Id.* at 19.

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[4] References to items in the Appendix to the Brief in Opposition to the Petition for Writ of Certiorari will be designated "App. to Opp. to Cert." followed by the applicable page number.

On February, 13, 1989, FirsTier also filed a document which it called "FirsTier's Suggested Findings of Fact and Conclusions of Law." App. to Opp. to Cert. B-1. FirsTier's "Suggested Findings" reassert virtually every factual and legal argument FirsTier had made in opposition to IMI's Motion for Summary Judgment. As with the February 13, 1989 "Objection", FirsTier's "Suggested Findings" argue for findings and conclusions which are directly contrary to those submitted by IMI. FirsTier's "Suggested Findings" conclude by arguing that "IMI is not entitled to summary judgment." *Id.* at B-17.

Subsequently, on March 3, 1989, the trial court announced a final decision in favor of IMI. The trial court's final decision was embodied in a formal "Memorandum Opinion" (App. to Pet. for Cert. E-1) and a separate "Order and Judgment" pursuant to Rule 58 of the Federal Rules of Civil Procedure (*Id.* at D-1). The Court's Memorandum Opinion is reported at 708 F. Supp. 1224 (W.D. Okl. 1989). Also, on March 3, 1989, the "Order and Judgment" of the trial court was entered on the clerk's docket pursuant to Rule 79(a) of the Federal Rules of Civil Procedure. App. to Pet. for Cert. F-14, Doc. 159.

FirsTier also filed a notice of appeal from the March 3, 1989 final decision. J.A. 58. However, FirsTier did not file that appeal within 30 days after entry of the final judgment rendered on March 3, 1989. Instead, FirsTier sought and obtained leave of court to file the appeal out of time. J.A. 55 & 57. IMI timely appealed from the trial court's order allowing FirsTier to file the appeal out of time. R. Doc. 182. FirsTier's appeal from the March 3, 1989 final judgment and IMI's appeal from the trial court's order allowing FirsTier to appeal out of time are

docketed as Case Nos. 89-6145 and 89-6150, respectively, in the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit heard oral argument on both cases on May 1, 1990.

On September 26, 1989, the United States Court of Appeals for the Tenth Circuit entered an Order dismissing FirsTier's appeal from the January 26, 1989 oral announcement for want of jurisdiction. The Tenth Circuit held as follows:

> 89-6042 is dismissed for lack of jurisdiction. The oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291.

See App. to Pet. for Cert. A-2.

The Supreme Court granted certiorari to review the propriety of the Tenth Circuit's dismissal of the appeal from the oral announcement. As noted above, FirsTier's subsequent appeal from the March 3, 1989 final order is still pending before the Tenth Circuit.

SUMMARY OF ARGUMENT

A final judgment is one that ends the litigation and leaves nothing for the court to do but execute on the judgment. The oral announcement by the trial court at the January 26, 1989 hearing on IMI's Motion for Summary Judgment was not a final judgment. The trial court did not evidence its intent that the oral announcement would be its final act. Instead, the trial court requested that IMI submit findings of fact and conclusions of law, informed FirsTier that it would have an opportunity to object to

IMI's suggested findings and conclusions, and informed the parties that after reviewing the suggestions it would modify, add to, or delete from them and write its own findings and conclusions and judgment.

28 U.S.C. §1291 vests the Courts of Appeals with appellate jurisdiction to review *final* judgments of the District Courts. Further, pursuant to 28 U.S.C. §2107, the Courts of Appeals can review a final judgment only when appellate jurisdiction is invoked by the timely filing of a notice of appeal. Since the oral announcement was not a final judgment, Section 1291 does not confer jurisdiction on the Court of Appeals to review it. Consequently, FirsTier's Notice of Appeal *from the January 26, 1989 oral announcement* is an ineffective attempt to appeal a nonfinal oral announcement.

Rule 4(a)(2) of the Fed. R. App. P. does not validate FirsTier's premature appeal. By its terms, Rule 4(a)(2) merely treats a Notice of Appeal filed after announcement of a decision but before its entry on the civil docket as being filed after the decision is entered. Rule 4(a)(2) does not expand the appellate jurisdiction conferred by 28 U.S.C. §1291. It does not allow a party to appeal a nonfinal decision and it does not abrogate the jurisdictional requirement that a timely notice of appeal be filed in order to invoke appellate jurisdiction.

Final judgment was not entered in this case until March 3, 1989. If FirsTier wished to appeal the March 3, 1989 final judgment, FirsTier was required to file a notice of appeal within 30 days thereafter. The notice of appeal filed in this case purports to appeal from the January 26, 1989 oral announcement and not from the March 3, 1989

final judgment. Further, the notice of appeal was filed before the final judgment was either announced or entered. Consequently, FirsTier's Notice of Appeal does not satisfy the jurisdictional requirements for effecting an appeal and is therefore ineffective to invoke appellate jurisdiction. Accordingly, the United States Court of Appeals for the Tenth Circuit properly dismissed the appeal.

LEGAL ARGUMENTS AND AUTHORITIES

PROPOSITION I

THE JANUARY 26, 1989 ORAL ANNOUNCEMENT WAS NOT A FINAL APPEALABLE ORDER BECAUSE THE TRIAL COURT INTENDED TO AND DID FOLLOW THE ORAL ANNOUNCEMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

Under 28 U.S.C. §1291, the Courts of Appeals have appellate jurisdiction only over "final decisions" of the district courts. In pertinent part, §1291 provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. (Emphasis added).

The Supreme Court has long held that a final decision under §1291 is one which "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *Accord, United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232, 78 S.Ct. 674, 678, 2 L.Ed.2d 721 (1958); *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 565 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979). The purpose of the finality requirement is to prevent piecemeal litigation by precluding appellate review until the trial court finally disposes of the entire case – " '[t]he case is not to be sent up in fragments.' " *Catlin*, 324 U.S. at 233, 65 S.Ct. at 634 (citation omitted). Consequently, a judgment is final only when it "evidences the judge's intention that it shall be his final act in the case." *F. & M. Schaefer Brewing Co.*, 356 U.S. at 232, 78 S.Ct. at 678. *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387-388, 98 S.Ct. 1117, 1127, 55 L.Ed.2d 357 (1978) (district court intended that decision be final).

Measured by this standard, the trial court's oral announcement at the January 26, 1989 hearing was not a final decision. The oral announcement did not, as articulated by the Supreme Court, "leave nothing for the court to do but execute on the judgment" and did not "evidence the judge's intention that it shall be his final act in the case." On the contrary, the trial court requested that IMI prepare suggested findings of fact and conclusions of law and allowed FirsTier a specified period of time to respond thereto. The trial court expressly informed the parties that after reviewing the suggested findings and conclusions, the court would "modify, add to or delete" from them as the court deemed appropriate and would then "write its own findings of fact and conclusions of law and judgment." Thus, the court clearly indicated its intent to retain jurisdiction over the case until it rendered a final decision. And, approximately five weeks later, the trial court rendered its Memorandum Opinion and a final Order and Judgment.[5]

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[5] The docket entry on January 26, 1989 merely recites that the hearing occurred, that the trial court heard oral argument,

(Continued on following page)

Further, the oral announcement was treated as interlocutory by the parties.[6] Both parties submitted suggested findings of fact and conclusions of law. FirsTier even urged the Court to reverse its preliminary decision and find that IMI was *not* entitled to summary judgment. Thus, FirsTier's assertion that as a practical matter the oral announcement was a final decision is flatly contradicted by the record. Indeed, FirsTier's "Objection" and "Suggested Findings", which challenged whether IMI

(Continued from previous page)

that the trial court indicated that the policies should be cancelled, that the parties should submit suggested findings of fact and conclusions of law, and that the trial court would modify, add to, or delete from the suggested findings and conclusions and enter its own. Pet. for Cert. F-13, Doc. 148. The trial court did not render a final judgment and judgment was not entered in the civil docket until March 3, 1989 when the court rendered its "Memorandum Opinion" and a separate "Order and Judgment." *Id.* at F-14, Docs. 158 and 159.

[6] FirsTier contends IMI treated the oral announcement as a final decision because shortly after the January 26, 1989 hearing, counsel commenced research regarding a prevailing party's right to recover attorney fees, filed a fee application, and inquired about procedures for publishing court decisions. However, unlike the requirements for perfecting an appeal, nothing in the local court rules regarding fee applications is jurisdictional and nothing in the local court rules prevents a party from filing a fee application *before* announcement of a final decision. Further, IMI filed a supplementary fee application *after* final judgment was entered, thereby assuring that a timely fee application had been filed. J.A. 36. Finally, FirsTier's reliance on statements made in the Supplementary Application that IMI had won a "complete and total victory" is misplaced. As noted, the Supplementary Application was filed *after* final judgment was announced and entered.

was entitled to summary judgment, implicitly acknowledge that until the trial court rendered a final decision, the preliminary decision orally announced at the hearing was nothing more than a statement of intention which was subject to change.

The Supreme Court has recognized that when a judge indicates his intention to render a formal judgment, it is the formal judgment and not statements in an opinion or docket entry that constitute the final judgment:

> Where, as here, a final judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 235, 78 S.Ct. 674, 679, 2 L.Ed.2d 721 (1958).

Similarly, in *Carnes v. United States*, 279 F.2d 378, 379-80 (10th Cir. 1960), *cert. denied*, 364 U.S. 846 (1960), the Tenth Circuit held that an oral announcement cannot constitute a final decision when the trial court indicates that it intends to follow the oral announcement with a formal judgment:

> For the purpose of an appeal, a final judgment is the court's act or pronouncement which disposes of the matter under consideration. . . . When the Judge acts in a manner which clearly indicates his decision that the act shall be the final one in the case and a notation of the act has been entered on the docket, the time to appeal begins to run under Rule 73(a). But if it is not clearly indicated that the Judge's act was intended to be his final act in the case, and if it appeared that a formal judgment is contemplated, then the time for appeal does not begin to run.

Id. at 379-380 (citations omitted). The *Carnes* Court concluded:

> From the record as a whole, including the showing that a formal order was signed at a later date, we conclude that the judge did not intend his declaration from the bench to be his final act, but did intend that a formal order denying the motion would be prepared and signed by him.

Id. at 380 (footnote omitted). *Accord Campbell Industries v. Logistics Int'l, Inc.*, 816 F.2d 1401, 1404 (9th Cir. 1987).

The trial court in the instant case did not intend that the oral announcement would be its final act. The trial court clearly evidenced its intention to retain jurisdiction and to write findings of fact and conclusions of law and judgment. Final judgment was not announced or entered until March 3, 1989, when the court filed its "Memorandum Opinion" and a separate "Order and Judgment" and the same was entered on the clerk's docket. Fed. R. Civ. P. 58. Consequently, the oral announcement was not a final appealable decision and the Notice of Appeal, *filed before a final judgment was announced or entered,* was premature

and ineffective to vest the Court of Appeals with appellate jurisdiction:

> Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court . . . An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction.

Century Laminating, Ltd. v. Montgomery, 585 F.2d 563, 567 (10th Cir. 1979), *cert. dismissed* 444 U.S. 987 (1979).

The *Century Laminating* Court concluded by noting that when a premature appeal is filed interests of justice *do not* require that the Court give effect to the appeal; instead, the Court held that the "virtue in finality" mandates dismissal "especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself". *Id.* at 568. Because the January 26, 1989 oral announcement was not intended as the court's final act, the oral announcement was not a final decision, the appeal was premature, and the Court of Appeals properly dismissed the case for want of jurisdiction.

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL, FILED BEFORE ANNOUNCEMENT OF A FINAL DECISION, IS PREMATURE AND INEFFECTIVE TO INVOKE APPELLATE JURISDICTION.

A. THE REQUIREMENT FOR A TIMELY NOTICE OF APPEAL IS MANDATORY AND JURISDICTIONAL.

Pursuant to 28 U.S.C. §2107 and Fed. R. App. P. 4(a)(1), a notice of appeal in a civil case must be filed

within thirty days *after* entry of the judgment or order from which appeal is taken. This time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1978); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Maryland Casualty Co. v. Conner*, 382 F.2d 13, 15 (10th Cir. 1967).

FirsTier's reliance on *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), for the proposition that the absence of prejudice somehow affects the jurisdictional requirements imposed by the Federal Rules is misplaced. The *Torres* Court specifically noted that *Foman* did not involve a jurisdictional issue because the appellant in *Foman* had complied with the applicable rules. *Torres*, 108 S.Ct. at 2408. The *Torres* Court concluded that although a court may liberally construe the rules, "it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres*, 108 S.Ct. at 2409. The *Torres* Court reasoned that to the extent the jurisdictional requirements imposed by the Federal Rules of Appellate Procedure lead to harsh results, " 'the harshness of our construction is imposed by the legislature and not by the judicial process.' " *Torres*, 108 S.Ct. at 2409.

Final judgment was announced and entered on March 3, 1989. Thus, pursuant to 28 U.S.C. §2107 and Rule 4(a)(1), if FirsTier wished to appeal it was required to file a Notice of Appeal within 30 days thereafter. However, FirsTier did not file an appeal from the March 3, 1989 Order within the 30 day mandatory time period. In fact, *the Notice of Appeal at issue in this case was not taken from the March 3, 1989 final judgment*. Instead, FirsTier

appealed from the interlocutory oral announcement and noticed that appeal on February 8, 1989, more than three weeks *before* final judgment was announced. J.A. 54.[7] Thus, the appeal is untimely and was properly dismissed by the court of appeals.

B. RULE 4(a)(2) OF THE RULES OF APPELLATE PROCEDURE IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

1. Rule 4(a)(2) applies only when a notice of appeal is filed after announcement of a final decision.

FirsTier contends that under Fed. R. App. P. 4(a)(2) the premature Notice of Appeal *from the January 26, 1989 oral announcement* operates as an appeal from the *subsequent* final judgment. However, because the trial court did not announce a final decision at the January 26, 1989 hearing, Rule 4(a)(2) is not applicable and does not validate the appeal. Rule 4(a)(2) of the Rules of Appellate Procedure provides:

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[7] FirsTier later filed a Notice of Appeal from the March 3, 1989 final judgment. J.A. 58. The latter appeal is an appeal on the merits. However, it was filed out of time. FirsTier sought and obtained leave for filing the appeal out of time. J.A. 55 & 57. IMI timely appealed from the trial court's order allowing FirsTier to file the appeal out of time. R. Doc. 182. FirsTier's appeal from the March 3, 1989 final judgment and IMI's appeal from the trial court's order allowing FirsTier to appeal out of time are pending before the United States Court of Appeals for the Tenth Circuit. Both appeals have been fully briefed. The Tenth Circuit heard oral argument on both cases on May 1, 1990.

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

By its express terms, Rule 4(a)(2) validates a premature notice of appeal only when the notice is filed after a decision or order but before the entry of judgment. In light of Rule 1(b) which explicitly provides that the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law," Rule 4(a)(2) can be read *only* to validate premature appeals taken from "final decisions" as that term is used in 28 U.S.C. §1291. Indeed, it is only from such final decisions that §1291 confers appellate jurisdiction on the courts of appeals. Consequently, Rule 4(a)(2) cannot operate to render the February 8, 1989 Notice of Appeal effective. The January 26, 1989 oral announcement was not a final decision and it was not the same decision ultimately entered on March 3, 1989. According to Professor Moore:

> [Rule 4(a)(2)] applies, therefore, only to a decision that will be final on its entry. It does not make appealable an order that is not appealable under §1291 or §1292(a). It remains true, therefore, that an appeal from an interlocutory order not appealable under §1292(a) will be dismissed and an appeal will have to be taken from the final decision. Nor does it save an appeal that is taken from an order appealable only on a finding under Rule 54(b).

9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶204.14 at 4-128 -- 4-129 (2d ed. 1990).

2. Rule 4(a)(2) is intended to validate appeals filed after announcement of a final decision but before the decision is entered.

The circumstances surrounding the adoption of the 1979 amendments to the Federal Rules of Appellate Procedure, which include the amendment to Rule 4(a)(2) at issue in this case, confirm Professor Moore's analysis. The Supreme Court had recently decided *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978). *Bankers Trust* addressed the provision in Fed. R. Civ. P. 58 that a judgment[8] is effective only when set forth on a separate document and entered as provided in Rule 79(a). In the *Bankers Trust* case, judgment had been entered on the civil docket pursuant to Rule 79(a) but the judgment was never set forth on a separate document as required by Rule 58. Nevertheless, the Supreme Court ruled that the Court of Appeals had jurisdiction over the case. The Court reasoned that the parties waived the separate document requirement since judgment had been entered on the judgment docket, the trial court had evidenced its intent that the judgment was its final act, and the appellee did not object to the appellant taking the appeal. *Bankers Trust*, 435 U.S. at 387-388, 98 S.Ct. at 1127.

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[8] The Supreme Court noted that "[a] 'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. §1291." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, n.4, 98 S.Ct. 1117, 1119, 55 L.Ed.2d 357 (1978). The Supreme Court noted that Federal Rule of Civ. Proc. 54(a) provides that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." *Id.*

However, the *Bankers Trust* Court distinguished the separate document requirement from Rule 58's requirement that a judgment be entered pursuant to Rule 79(a), recognizing that "the keeping of a civil docket under Rule 79 fulfills a public record keeping function over and above the giving of notice to the losing party that a final decision has been entered against it." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, n.4, 98 S.Ct. 1117, 1119, 55 L.Ed.2d 357 (1978). Accordingly, the *Bankers Trust* Court assumed, without deciding, that unlike the separate document requirement, the *entry* of judgment required by Rule 58 is a jurisdictional prerequisite to appellate review. *Bankers Trust*, 435 U.S. at 384, 98 S.Ct. at 1119. Consequently, after *Bankers Trust*, a notice of appeal filed after announcement of a final decision but before the decision was entered as required by Rules 58 and 79(a) might not have been effective to invoke appellate jurisdiction.

Rule 4(a)(2) filled the gap created by *Bankers Trust*. The rule was intended to assure that a notice of appeal filed after announcement of a final decision but before entry of judgment would not result in loss of the appeal. The rule was not intended to allow a party to commence an appeal before a final decision had been announced. To hold otherwise would contravene Fed. R. App. P. 1(b) by impermissibly expanding 28 U.S.C. §1291 to allow the courts of appeals to review interlocutory orders.

In fact, such a result is precluded by the plain language of the rule. By its terms, Rule 4(a)(2) merely operates to treat a notice of appeal filed after announcement of an order but before its entry as being filed after entry. Rule 4(a)(2) does not purport to amend the notice of appeal to change the order sought to be reviewed. Thus,

if Rule 4(a)(2) was applicable to interlocutory orders, it would operate only to treat a premature notice of appeal as being filed after entry of the *interlocutory* order. The order appealed from would still be interlocutory in nature and the court of appeals would not have jurisdiction. 28 U.S.C. §1291. One court articulated the jurisdictional defects created by such an interpretation as follows:

> Hence the issue is whether the defendants can appeal from a subsequent final judgment, without having a notice of appeal from that judgment, merely because they filed an earlier notice of appeal from a nonfinal, nonappealable order. We think not.

United States v. Hansen, 795 F.2d 35, 38 (7th Cir. 1986). The *Hansen* Court noted that the appellant, "anticipating defeat, might as well have filed the notice of appeal simultaneously with the filing of their counterclaims." *Id.*

3. Rule 4(a)(2) should not be construed to validate appeals from interlocutory orders or nonfinal announcements because such a construction would result in both the reviewing court and the trial court simultaneously reviewing the same announcement.

It has long been "understood that a federal district court and a federal court of appeals should not exercise jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 54, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). Consequently, the filing of a notice of appeal is an event of jurisdictional significance that divests the district court of jurisdiction. *Id.* However, Rule 4(a)(4) gives the district court express authority to entertain certain motions, including motions under Fed.

R. Civ. P. 52(b) to amend or make additional findings of fact and motions under Rule 59 to alter or amend the judgment, even *after* a notice of appeal is filed. *See* Fed. R. App. P. 4(a)(4); *Griggs*, 459 U.S. at 59, 103 S.Ct. at 402. In order to assure that the district court and the court of appeals do not exercise jurisdiction over the same matter, however, the 1979 amendments expressly provide that a notice of appeal filed before entry of the order on one of the motions enumerated in Rule 4(a)(4) is ineffective and a new notice of appeal must be filed. *See* Rule 4(a)(4).

Pursuant to Rule 4(a)(4), the Supreme court has made clear that a notice of appeal filed before entry of judgment on one of the motions listed in Rule 4(a)(4) is a nullity. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), the Supreme Court articulated this rule as follows:

> The notice of appeal filed in this case on November 19, 1980, was not merely defective; it was a nullity. Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'

Griggs, 103 S.Ct. at 403 (citations and footnotes omitted). *Accord, Acosta v. Louisiana Department of Health and Human Resources*, 478 U.S. 251, 106 S.Ct. 2876, 2878, 92 L.Ed.2d 192 (1986).

The *Griggs* Court recognized that a premature notice of appeal must be considered a nullity because otherwise

both the court of appeals and the district court would be simultaneously analyzing the same judgment. According to the *Griggs* Court, Rule 4(a)(4) was intended to avoid that potential conflict by depriving the courts of appeals of jurisdiction in such situations. *Griggs*, 459 U.S. at 61, 103 S.Ct. at 403.

FirstTier filed two pleadings on February 13, 1989 which it called "Objection to Defendant's Suggested Findings of Fact and Conclusions of Law" and "First-Tier's Suggested Findings of Fact and Conclusions of Law", respectively. Both pleadings assail the decision announced by the trial court at the January 26, 1989 hearing and argue for findings and conclusions that support a decision in favor of FirsTier on IMI's Motion for Summary Judgment. Both pleadings specifically urge the trial court to find that "IMI is not entitled to summary judgment." App. to Opp. to Cert. A-19 and B-17.

FirsTier's "Suggested Findings" and "Objections" implicate the policy reasons underlying Rule 4(a)(4) regardless of whether they constitute tolling motions. In light of the fact that FirsTier filed the document before final judgment had been announced or entered, it is apparent that FirsTier intended for the trial court to consider the "Objections" and "Suggested Findings" when rendering a final decision in this case. However, if Rule 4(a)(2) is interpreted to validate the premature notice of appeal, then contrary to the policy underlying the 1979 amendments to Rule 4, the court of appeals and the trial court would be analyzing the same oral announcement at the same time. Thus, Rule 4(a)(2) cannot be interpreted to validate FirsTier's appeal from the oral announcement.

4. Courts hold that Rule 4(a)(2) is not applicable to appeals taken from interlocutory orders.

The overwhelming majority of courts construing Rule 4(a)(2) in the context of interlocutory orders and nonfinal announcements agree with Professor Moore and hold that the rule is not applicable. *General Television Arts, Inc. v. Southern Railway Co.*, 725 F.2d 1327, 1330-1331 (11th Cir. 1984); *Osterneck v. E. T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 819 (1987); *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).

In *General Television, supra*, the appellant filed the notice of appeal after the trial court had entered a *partial* summary judgment but before the entry of a final decision. The premature appeal could not be saved by a Rule 54(b) certification because the partial summary judgment went only to the issue of liability. Therefore, the appellant argued that the Court should give Rule 4(a)(2) a liberal reading and allow the appeal. The Court refused, holding that Rule 4(a)(2) validated only those premature notices of appeal that are filed after announcement of a *final* judgment but before the final judgment is formally entered:

> The purpose of that rule is to avoid the harsh result that may obtain when a district court has announced its final judgment and zealous counsel in his haste to file a notice of appeal does so before the district court formally enters the order containing its judgment. The rule was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. Hence this Court and its predecessor continue to hold after the enactment of Rule 4(a)(2) in 1979 that a final judgment does not "retroactively validate the premature notice of appeal." . . . Consequently, Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal *after* the announcement of judgment but before the entry of the order.
>
> There was no announcement of the final judgment prior to GTA's filing of the notice of appeal. . . . Consequently, the district court's certification for interlocutory appeal of its partial summary judgment on liability cannot be considered an announcement of final judgment. Because this Court is without jurisdiction, the APPEAL IS DISMISSED.

General Television, 725 F.2d at 1330-31 (citations and footnotes omitted). *Accord, Hansen*, 795 F.2d at 38; *Robinson*, 798 F.2d at 1382-83.

General Television and the authorities cited above comport with the plain meaning of Rule 4(a)(2) and establish that the February 8, 1989 Notice of Appeal is ineffective because it purports to take an appeal from an interlocutory oral announcement, not a *final* decision. Accordingly, the Court of Appeals properly dismissed the appeal.

C. CASE LAW APPLYING RULE 4(a)(2) TO PREMATURE APPEALS FILED AFTER A FINAL DECISION ON SOME BUT NOT ALL CLAIMS IS INAPPOSITE TO THIS CASE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

FirsTier cites a line of cases from various circuits for the proposition that the Court of Appeals' decision in this

case is in conflict with decisions from the other circuits. FirsTier's Brief at 29-31. The cases cited by FirsTier are inapposite because they concern situations where the trial courts had rendered judgments disposing of some but not all of the claims at issue. The parties against whom judgment had been rendered filed appeals before judgment was entered on the remaining claims and without first obtaining Rule 54(b) certifications. The various Courts held that the appeals ripened when the remaining claims were finally disposed of. *See Sacks v. Rothberg*, 845 F.2d 1098, 1099 (D.C. Cir. 1988) (judgment on complaint did not dispose of counterclaims); *Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (same); *Rivers v. Washington County Bd. of Educ.*, 770 F.2d 1010, 1011 (11th Cir. 1985) (judgment disposed of claims of one plaintiff but not the other); *Knight v. Brown Transport Corp.*, 806 F.2d 479, 483-484 (3rd Cir. 1986) (same); *Freeman v. Hittle*, 747 F.2d 1299, 1301 (9th Cir. 1985) (summary judgment for one defendant but not the others).[9]

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[9] FirsTier also cites *Diamond v. McKenzie*, 770 F.2d 225 (D.C. Cir. 1985). However, the only issue before the *Diamond* Court was whether the separate document required by Fed. R. Civ. P. 58 was a jurisdictional prerequisite to appellate review. The order appealed from was final in all other respects and judgment had been entered as required by Rules 58 and 79. Relying on *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978), the Court held that a separate document was not necessary to appellate jurisdiction. Rule 4(a)(2) was not at issue in the *Diamond* case. Further, the *Diamond* case is inapposite because the oral announcement in this case was not a final decision and judgment was not entered before the appeal was filed. *See Jones v. Celotex Corp.*, 857 F.2d 273, 275 (5th Cir. 1988), *cert. denied* 110 S.Ct. 260 (the separate document rule cannot be waived if there has been no final decision.).

The cases cited by FirsTier do not conflict with the Court of Appeals' decision in this case. Rather, they are consistent with the general rule recognized in many circuits, *including the Tenth Circuit*, that in cases involving multiple claims and multiple parties, a notice of appeal filed after entry of an interlocutory order disposing of some but not all of the claims or parties may nevertheless be rendered effective if the interlocutory order is later rendered final by disposing of the remaining claims or by subsequently entering a Rule 54(b) certification. *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 643-644 (10th Cir. 1988). In fact, this is the precise context in which the Tenth Circuit recently held that Fed. R. Civ. P. 4(a)(2) permits the interpretation that a subsequent Rule 54(b) certification ripens a premature notice and saves the appeal. *Id.* at 645. *See also Robinson v. Tanner*, 798 F.2d 1378, 1382-1385 (11th Cir. 1986) (analyzing various decisions, including decisions cited by FirsTier, and holding that an appeal from an order which is not final as to any claim or party must be dismissed as premature).

Critically, in a Rule 54(b) situation, the otherwise "premature" appeal satisfies the jurisdictional requirements imposed by 28 U.S.C. §1291 because a Rule 54(b) certification can be granted only where the decision appealed from finally disposes of an entire claim or party. *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986). As articulated by the *Hansen* Court:

> The notice of appeal in such a case is timely; all that is missing is a finding necessary to make the order appealed from appealable.

Hansen, 795 F.2d at 38.

Obviously, this rationale is inapplicable where, as here, the decision appealed from is not final because the trial court has retained power to amend the judgment and has indicated its intent to prepare a formal judgment and separate findings and conclusions as to all claims. *See Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd sub nom. Osterneck v. Ernst & Whinney*, ___ U.S. ___, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 566 (10th Cir. 1979), *cert. dismissed*, 444 U.S. 987 (1979); *Robinson v. Tanner*, 798 F.2d 1378, 1382-83 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).[10] Thus FirsTier's cases are inapposite and do not conflict with the Court of Appeals' decision in this case.[11]

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[10] FirsTier's reliance on *United States v. Green*, 847 F.2d 622 (10th Cir. 1988), is misplaced. *Green* involved an appeal from a *criminal* conviction. Further, the appeal was taken only after Green entered a conditional plea of guilty under Fed. R. Crim. P. 11(a)(2), which permits an appeal of "the adverse determination of any specified pretrial motion". Fed. R. Crim. P. 11(a)(2) is not applicable to this case. Finally, the *Green* Court acknowledged that Rule 4(b) applies only where "the filing occurs after the announcement of a decision with the substantive requisites of finality." *Id.* at 623. As discussed above, the oral announcement in this case was not a final decision.

[11] A panel of the Fifth Circuit has held that Rule 4(a)(2) validates a premature appeal taken from an interlocutory decision. *Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988). The *Alcom* panel acknowledged that its decision conflicted with prior Fifth Circuit precedent, *see United States v. Taylor*, 632 F.2d 530 (5th Cir. 1980), but concluded that it was required to follow a previous panel decision which preceded the *Taylor* case. *Alcom*, 849 F.2d at 967-968. Even so, the *Alcom* court stated that the *Taylor* rule, and not the rule adopted by

(Continued on following page)

PROPOSITION III

BANKERS TRUST CO. V. MALLIS IS NOT APPLICABLE BECAUSE THE ORAL ANNOUNCEMENT WAS NOT A FINAL DECISION.

The Federal Rules of Civil Procedure specifically provide that no judgment is effective until it is set forth on a separate document and entered on the civil docket. Fed. R. Civ. P. 58. The Advisory Committee that drafted the separate-document requirement noted that prior to its adoption there was confusion over whether words contained in a written opinion or memorandum, like " 'the plaintiff's motion [for summary judgment] is granted,' " constitutes a final decision. The Advisory Committee reasoned that the separate-document requirement "eliminates these uncertainties by requiring that there be a judgment set out on a separate document – distinct from any opinion or memorandum – which provides the basis for the entry of judgment." *See* Notes of Advisory Committee on Rules, following 28 U.S.C.A. Fed. R. Civ. P. 58, at page 642. According to the Supreme Court: "The

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(Continued from previous page)

the *Alcom* panel, was the better reasoned approach. *Id.* at 967-969. In *Robinson v. Tanner*, 798 F.2d 1378, 1382-1385 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 319 (1987), the Eleventh Circuit reconciled the conflicting Fifth Circuit precedent and concluded that no real conflict existed. The Eleventh Circuit recognized the distinction between situations where the appeal is taken from an order that is final as to some but not all claims or parties and the situation where an appeal is taken from an interlocutory order which is not final as to any claim or party. *Id.* The Eleventh Circuit held that in the latter situation, the premature appeal must be dismissed as premature. *Id.* at 1385.

sole purpose of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C. §2107 begins to run." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (footnote omitted).

The *Bankers Trust* Court did hold that in an appropriate case the separate-document rule could be waived; however, the *Bankers Trust* case was limited to the situation where judgment has been entered on the clerk's docket but the separate document required by Rule 50 "has *accidentally* not been entered." *Bankers Trust*, 435 U.S. at 388, 98 S.Ct. at 1127 (emphasis added). FirsTier relies on *Bankers Trust* to argue that the parties "waived" the separate-document requirement in this case. FirsTier's argument misses the mark. The waiver rule announced by the *Bankers Trust* Court is not at issue in this case. The January 26, 1989 oral announcement was not set forth on a separate document because it was *not* a *final* decision. *Jones v. Celotex Corp.*, 857 F.2d-273, 275 (5th Cir. 1988) (the separate document requirement cannot be waived when there is not a final decision). Further, even if the oral announcement had been intended as a final decision, the waiver rule would not apply because the oral announcement was *not* entered on the judgment docket. In any event, the waiver rule is not applicable because neither the parties nor the trial court treated the oral announcement as a final decision or intended to waive the separate document requirement.

In the *Bankers Trust* case, the final judgment of the trial court was not set forth on a separate document. Instead, the appeal was taken from a combined opinion and order of the trial court which expressly concluded:

" 'Complaint dismissed in its entirety. So ORDERED.' ". An entry was made on the clerk's docket on the same day containing those same words. *Id.* at 382, n. 1, 98 S.Ct. at 1119. The *Bankers Trust* Court reasoned that under such circumstances the Court of Appeals could properly assert appellate jurisdiction, even in the absence of a separate document. The Supreme Court's analysis is instructive:

> "[T]he District Court clearly evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case. A judgment of dismissal was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment."

Bankers Trust, 435 U.S. at 387-388, 98 S.Ct. at 1127.

None of these circumstances are present in the instant case. First, the trial court did not indicate that its oral announcement would represent the final decision in the case. On the contrary, the trial court ordered IMI to prepare suggested findings of fact and conclusions of law, expressly granted FirsTier the opportunity to submit objections to IMI's suggested findings and conclusions, and advised the parties that "[t]he Court will then modify, add to it, delete and write its own findings of fact and conclusions of law *and judgment* on each of these eight policies that we have talked about." J.A. 27 (emphasis added).

Second, the parties did not waive the separate document requirement. Pursuant to the Court's request, both parties subsequently submitted suggested findings of fact

and conclusions of law and awaited the trial court's own findings of fact and conclusions of law *and judgment*. Third, the trial court's oral announcement was not entered in the clerk's docket because it was not intended as a judgment – as noted, the trial court expressly said at the January 26, 1989 hearing that it would write its own findings of fact and conclusions of law *and judgment*.

Unlike the situation in *Bankers Trust*, the fact that a judgment was not set forth on a separate document on January 26, 1989 was not an "error" or an "accident". The trial court did not intend that its oral announcement would be its final decision and the parties did not "waive" the separate document requirement. Under such circumstances, the January 26, 1989 oral announcement cannot be considered a final decision and the *Bankers Trust* case is inapplicable.

CONCLUSION

The Court of Appeals' decision dismissing this appeal for want of jurisdiction should be affirmed.

Respectfully submitted,

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No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
PROPOSITION I: TRIAL COURT ANNOUNCED FINAL DECISION AND ORDER ON JANUARY 26, 1989	5
A. Trial Court Decided All Issues as to All Parties on January 26, 1989	5
B. Parties Treated Oral Decision as Final	6
C. IMI Omits Results of Case Law Discussed in its Brief	7
PROPOSITION II: FIRSTIER'S NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED ON MARCH 3, 1989, IMMEDIATELY AFTER THE TRIAL COURT MEMORIALIZED ITS DECISION IN A WRITTEN ORDER	8
A. Trial Court's Oral Order Identical to Written Order	8
B. F.R.A.P. 4(a)(2) Intended To Treat Notice of Appeal From Non-appealable Order as Directed to Subsequently Entered Final Order	9
C. Notice of Appeal From Non-final Order Does Not Transfer Jurisdiction to Appellate Court	11

PROPOSITION III:
COURT OF APPEALS READS REQUIREMENT OF "FINALITY" INTO F.R.A.P. 4(a)(2) 12

A. F.R.A.P. 4(a)(2) Does Not Require Final Decision 12

B. Majority Approach Does Not Require Announcement of Final Judgment 13

C. Circuit Court Decision Follows Minority Approach 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185 (9th Cir. 1986) 14

Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165-1166 (5th Cir. 1984) 14

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 9, 13, 15

Campbell Industries v. Offshore Logistics Int'l, Inc., 816 F.2d 1401 (9th Cir. 1987) 7

Carnes v. United States, 279 F.2d 378 (10th Cir. 1960) 7

Dowling v. Philadelphia, 855 F.2d 136 (3d Cir. 1988) 14

Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc., 876 F.2d 353 (4th Cir. 1989) 14

Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965) 6, 10, 12

Foman v. Davis, 371 U.S. 178 (1962) 15

General Television Arts, Inc. v. Southern Ry. Co., 725 F.2d 1327 (11th Cir. 1984) 15, 16

Gillespie v. U.S. Steel Corporation, 379 U.S. 148 (1964) 11

Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1975) 6, 10, 15

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177 (7th Cir. 1985) 16

Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), *cert. den.*, 451 U.S. 908 (1981) 14

Lewis v. B.F. Goodrich Co., 850 F.2d 641 (10th Cir. 1988) 14, 15

Page(s)

Matter of Grand Jury Empaneled January 21, 1975, 541 F.2d 373 (3d Cir. 1976) 6, 10, 15

Mississippi Pub. Corporation v. Murphree, 326 U.S. 438, 444 (1946) 9

Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir. 1966), *cert. den.*, 386 U.S. 1011 (1967) 6, 10, 12

Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971) 6

Tidler v. Eli Lilly and Co., Inc., 824 F.2d 84 (D.C. Cir. 1987) 14

Torres v. Oakland Scavenger Co., 108 S.Ct. 2405, 2408 (1988) 9, 15

United States v. F.&M. Schaefer Brewing Co., 356 U.S. 227 (1958) 7

United States v. Hansen, 795 F.2d 35 (7th Cir. 1986) 11, 15-17

FEDERAL RULES OF PROCEDURE

Page(s)

Federal Rule of Appellate Procedure 4(a)(2) 3, 6, 9-18

Federal Rule of Appellate Procedure 4(a)(4) 11, 17

Federal Rule of Appellate Procedure 4(a)(6) 13

Federal Rule of Civil Procedure 50 14

Federal Rule of Civil Procedure 52 14

Federal Rule of Civil Procedure 54(b) 14, 16, 17

Federal Rule of Civil Procedure 58 ..... 14, 16

Federal Rule of Civil Procedure 59 ..... 10, 12, 14

Federal Rule of Civil Procedure 63 11

Western District of Oklahoma Local Rule 6 6

STATUTES

28 U.S.C. §1291 ..... 3, 12

36 O.S. §3629(B) 6

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

FirsTier Mortgage Co., a/k/a Realbanc, Inc. ("FirsTier"), Petitioner, sued Investors Mortgage Insurance Co. ("IMI"), Respondent, for enforcement of eight policies of private mortgage-guaranty insurance. IMI moved for summary judgment. The trial court heard IMI's Motion for Summary Judgment on January 26, 1989. At the conclusion of the hearing, the trial court announced his order, from the bench, that the

policies "***are cancelled.***" (J.A. p. 27.)[1] The clerk made a docket entry of the proceedings.

For reasons unknown to FirsTier, IMI chose to paraphrase the clerk's January 26, 1989 docket entry. (IMI's Brief, f.n. 5, pp. 9 & 10.) Perhaps IMI did this because the actual docket entry requires some decoding. The docket entry reads:

> HRG ON DFT'S MTN SJ: cnsl apr & Ct hrs oral args fm both sides; Ct advises policy ***should be &/or*** *[sic]* ***cancelled as void*** for want of fraud, bad faith; no evidence in hrg to hold [sic] policy void; dft's cnsl to subm sugg FF&CofL as to ea loan w/i 10 days & send cpy to plf's cnls & plf's cnls to obj or sugg FF&CofL 5 days t/a; Ct will then modify, add to or delete & enter own FF&CofL (BOHANON) ap (App. to Pet. for Cert. p. F-13, Entry No. 148; emphasis added.)[2]

Compare the clerk's minute on the docket sheet with the language of the transcript:

> I find that the policies should be and ***are cancelled as void*** for want of [sic] fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that ***the policies are void.*** (J.A. p. 27; emphasis added.)

On March 3, 1989, the trial court memorialized its January 26, 1989 order in a written Order and Judgment. (App. to Pet. for Cert. p. D-1.)

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[1] References to the Joint Appendix will begin with "J.A." followed by the page number in the Joint Appendix.

[2] References to items printed in the Appendix to the Petition for a Writ of Certiorari will begin with "App. to Pet. for Cert." followed by the page number in the Appendix where the documents can be found.

On February 8, 1989, FirsTier filed its Notice of Appeal from the January 26, 1989 oral announcement. (J.A. p. 54.) The Notice of Appeal says that FirsTier appeals "from the Judge's ruling announced by the Court in this action on the 26th day of January, 1989, but not yet entered on its judgment docket. F.R.A.P. 4(a)(2)." The February 8, 1989 Notice of Appeal resulted in Appeal No. 89-6042. The United States Court of Appeals for the Tenth Circuit dismissed this appeal for lack of jurisdiction because "[t]he oral announcement by the district court on January 26, 1989 was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.)

There are three related appeals pending before the Tenth Circuit Court of Appeals.[3] Appeal Nos. 89-6145 and 89-6150 were both set for oral argument before the Tenth Circuit Court of Appeals on May 1, 1990. However, the Tenth Circuit Court of Appeals did not hear oral argument in both cases. When counsel for IMI appeared at the May 1, 1990 hearing, counsel for IMI announced that IMI elected to have Appeal No. 89-6150 submitted and decided on the briefs alone. The court of appeals has not heard oral argument in Case. No. 89-6150.

SUMMARY OF ARGUMENT

The trial court's oral order was the court's "announcement of a decision or order" within

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[3] For a description of the issues in Appeal Nos. 89-6145 and 89-6150, see FirsTier's Brief filed before this Court on April 12, 1990, f.n. 7, pp. 6 & 7. The third appeal is FirsTier's appeal from the trial court's award of IMI's attorney's fees, Appeal No. 89-6128.

the meaning of F.R.A.P. 4(a)(2). The oral order was final in the sense that it was a decision on the merits of all of the issues as to all of the parties. At the trial court level, the court and the parties understood the oral order to be final in this sense.

The fact that the trial court also announced his intention to memorialize his decision in a written judgment does not destroy finality of the oral announcement for purposes of F.R.A.P. 4(a)(2). To hold otherwise would disregard the distinction, recognized in the rule, between "announcement of a decision or order" and "entry of the judgment or order." Such a construction of the rule would also render the rule useless and ineffective because the rule could never give prospective effect to a notice of appeal from an oral decision which is followed by a written judgment.

The restrictive interpretation given to F.R.A.P. 4(a)(2) by the Tenth Circuit Court of Appeals would rewrite the phrase "announcement of a decision or order" to read "announcement of a final judgment." That interpretation violates the clear language and purpose of the rule. The stated purpose of the rule, as announced by the Advisory Committee, is the validation of an appeal noticed after announcement of a non-final decision which is subsequently entered as a part of the district court's final judgment.

ARGUMENT

PROPOSITION 1

TRIAL COURT ANNOUNCED FINAL DECISION AND ORDER ON JANUARY 26, 1989

A. Trial Court Decided All Issues as to All Parties on January 26, 1989. FirsTier sued IMI to enforce eight policies of private mortgage insurance. At the conclusion of the January 26, 1989 hearing on IMI's Motion for Summary Judgment, the trial court said "that the policies should be ***and are cancelled as void*** . . . ." (J.A. p. 27.) The trial court also said ". . . the policies ***are void***." *(Id.)* Contrary to IMI's assertion (IMI's Brief, p. 11), the trial court's oral order was not a statement of intention. The trial court spoke in the present tense. The trial court said that all of the policies "***are cancelled***" and "the policies ***are void***." (J.A. p. 27.) The trial court's oral decision disposed of all issues as to all parties and was final.

The opinion of the Tenth Circuit Court of Appeals does not say why the trial court's oral announcement was not a final decision. IMI contends that the trial court's oral announcement of its decision and order was not a final decision because the announcement was not intended as the court's final act. IMI makes this contention apparently because the trial judge announced his intention to memorialize his decision in a memorandum opinion and judgment. (IMI's Brief p. 13.) IMI's reasoning would emasculate F.R.A.P. 4(a)(2). Utilizing IMI's reasoning, F.R.A.P. 4(a)(2) could never give prospective effect to an appeal filed after announcement of an oral decision or order when the trial court later

memorializes its decision in a written journal entry. Utilizing IMI's reasoning, courts would be required to ignore F.R.A.P. 4(a)(2) in its entirety. Even before F.R.A.P. 4(a)(2) was adopted, the courts did not follow IMI's strict construction of what is meant by a "final decision or order." See, e.g., *Matter of Grand Jury Empaneled January 21, 1975,* 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge,* 507 F.2d 87 (3d Cir. 1975); *Song Jook Suh v. Rosenberg,* 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy,* 365 F.2d 385 (9th Cir. 1966) *cert. den.,* 386 U.S. 1011 (1967); *Firchau v. Diamond Nat'l Corp.,* 345 F.2d 269 (9th Cir. 1965).

B. Parties Treated Oral Decision as Final. IMI has argued that the trial court's oral decision and order was treated as interlocutory by the parties. (IMI's Brief p. 10.) IMI suggests that, when IMI filed its February 10, 1989 Application for Award of Attorney's Fees, it did not regard the oral announcement as a final decision because "nothing in the local court rules prevents a party from filing a fee application *before* announcement of a final decision." (IMI's Brief f.n. 6, p. 10; emphasis in original.) IMI's argument ignores the obvious: in order to be entitled to seek attorney's fees pursuant to Local Rule 6, the movant must be the prevailing party. In its February 10, 1989 fee application, IMI repeatedly characterized itself as the prevailing party.[4] (J.A. pp. 30-33.) Finally, IMI cannot dispute that in its

[4] Local Rule 6(E) also requires the movant to recite the statutory authority for its fee request. Consistent with the rule, in its February 10, 1989 fee application, IMI cited 36 O.S. §3629(B) as the statutory basis for its fee request. (J.A. p. 31.) IMI said that the statute "provides that the *prevailing party* in an action to recover on an insurance policy is entitled to recover its attorney's fees." *(Id.)*

February 10, 1989 Application for Attorney's Fees, IMI said: "IMI is clearly the prevailing party in the instant case ***since judgment was entered in favor of IMI as a matter of law*** and Firstier took nothing by way of its complaint." (J.A. p. 31; emphasis added.) It is proper to consider the trial court's and the parties' understandings and intentions to maintain an appeal. *United States v. F.&M. Schaefer Brewing Co.,* 356 U.S. 227 (1958).

Now IMI also wants to say that judgment was not announced until March 3, 1989. (IMI's Brief pp. 5, 8, 12, 14, 15 and 21.) But IMI's new characterization of its understanding of the trial court's decision is inconsistent with the record in the case. (See FirsTier's Brief pp. 11-15.)[5] When IMI filed its Bill of Costs, it took particular pains to revise the printed form to reflect that judgment was "***announced***" rather than "entered" on January 26, 1989. (FirsTier's Brief p. 12.) IMI offers no explanation of why it now takes a contrary position.

C. IMI Omits Results of Case Law Discussed in its Brief. IMI cites several cases which discuss situations in which a trial court intended to follow an oral announcement with a written judgment. See, e.g., *United States v. F.&M. Schaefer Brewing Co.,* 356 U.S. 227 (1958); *Campbell Industries v. Offshore Logistics Int'l., Inc.,* 816 F.2d 1401 (9th Cir. 1987); *Carnes v. United States,* 279 F.2d 378 (10th Cir. 1960). (IMI's Brief Proposition I.) IMI's discussion of the principles

[5] Reference to the Brief of Petitioner filed with this Court on April 12, 1990 will be to "FirsTier's Brief" followed by the page numbers in the Brief to which reference is made.

announced in these cases is accurate as far as the discussion goes. The problem is that the discussion stops short of the results in the cases. And, in each of these cases, the issue was whether the appeal was filed ***too late.*** In each of the cases, the appellate courts found that the appeal was timely because it was filed within the specified period of time after entry of a judgment. The appellate courts construed the rules to ***save*** the appeal, not to defeat it. If the case law authorities cited in Proposition I of IMI's Brief apply to this case at all, they support FirsTier's position.

PROPOSITION II

FIRSTIER'S NOTICE OF APPEAL SHOULD HAVE BEEN TREATED AS IF FILED ON MARCH 3, 1989, IMMEDIATELY AFTER THE TRIAL COURT MEMORIALIZED ITS DECISION IN A WRITTEN ORDER

A. Trial Court's Oral Order Identical to Written Order. At the conclusion of the January 26, 1989 hearing, the trial judge announced his decision. He ordered the subject insurance policies which were the subject matter of FirsTier's lawsuit "should be and ***are cancelled.***" (J.A. p. 27.) He said ". . . the policies ***are void.***" (Id.) Then, on March 3, 1989, the trial court entered a judgment which also found that the policies "***are void*** and, as such, ***are unenforceable.***" (App. to Pet. for Cert. p. D-1.). At the conclusion of its Memorandum Opinion, also entered on March 3, 1989, the trial court memorialized his decision that "the eight insurance policies at issue in this case ***are declared void.***" (App. to Pet. For Cert. p. E-15.) Contrary to IMI's assertion (IMI's Brief p. 16), the

trial court's oral decision and order and its subsequent memorialization of its order in a judgment were identical. The court of appeals should have treated FirsTier's February 8, 1989 Notice of Appeal as if it were filed on March 3, 1989, immediately after the trial court entered its Memorandum Opinion and Order and Judgment. F.R.A.P. 4(a)(2).

B. F.R.A.P. 4(a)(2) Intended To Treat Notice of Appeal From Non-appealable Order as Directed to Subsequently Entered Final Order. Subsection (a)(2) was incorporated in F.R.A.P. 4 as a part of the 1979 amendments to the rules. In ascertaining the meaning of the rules, the construction given to the rules by the Advisory Committee is of weight. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2408 (1988); *Mississippi Pub. Corporation v. Murphree*, 326 U.S. 438, 444 (1946). The Advisory Committee Notes say:

> The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See e.g., *Matter of Grand Jury Empanelled [sic] Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976) [sic]; *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 469 [sic] (9th Cir. 1965).[6]

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[6] IMI says that F.R.A.P. 4(a)(2) "filled the gap created by *Bankers Trust.*" (IMI's Brief p. 18.) The Advisory Committee Note to Subdivision (a)(2) makes it clear

In each of the cases cited by the Advisory Committee, a notice of appeal was filed after announcement of a decision or order, but prior to the formal entry of a written final judgment or order.[7] The appellate courts upheld jurisdiction because the decision in question, even though technically subject to modification,[8] was subsequently memorialized in an appealable, written judgment.[9]

In our case, the trial court announced, at the conclusion of the hearing on IMI's Motion for

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that the Advisory Committee was not looking to the *Bankers Trust* case. Instead, the amendment was intended to codify existing law that a notice of appeal which is directed to a non-appealable order will be regarded as directed to a subsequently entered final decision. The Advisory Committee made it clear that it intended the same result whether the nonappealable order was oral *(Matter of Grand Jury, supra; Hodge v. Hodge, supra)* ***or non-final*** *(Ruby, supra; Firchau, supra).*

[7] Two of the cases cited by the Advisory Committee were virtually identical to our case. *Matter of Grand Jury, supra; Hodge v. Hodge, supra.* In both *Matter of Grand Jury* and *Hodge v. Hodge,* the trial court orally announced its decision, the notice of appeal was filed and thereafter the trial court memorialized its orally announced decision in a written judgment. In both *Matter of Grand Jury* and *Hodge v. Hodge,* the court said that, so long as the trial court's written order is an appealable one and the non-appealing party is not prejudiced by the premature notice of appeal, the court of appeals should decide the case on the merits rather than dismiss the case based on a technicality. It is undisputed that, in our case, the trial court's March 3, 1989 written order was a final, appealable order. It is also undisputed that IMI was not prejudiced by FirsTier's premature notice of appeal.

[8] F.R.C.P. 59(d) provides that the court may, on its own initiative, order a new trial for any reason within 10 days after entry of judgment. Of course, any order, whether oral or written, is technically subject to modification during the time for filing post-decision motions.

[9] F.R.A.P. 4(a)(2) recognizes the distinction between (1) the announcement of a "decision or order" and (2) the entry of "the judgment or order." The term, "decision," is not defined in either the civil or appellate rules. Read in the context of the cases cited by the Advisory Committee, the term "announcement of a decision" encompasses oral announcements of orders from the bench.

Summary Judgment, that all of the policies which were the subject of FirsTier's lawsuit "are cancelled as void." (J.A. p. 27.) The trial court decided all of the issues as to all of the parties in the case. If this is not the kind of "announcement of a decision or order" within the contemplation of F.R.A.P. 4(a)(2), we do not know what would be.[10] One can tell by reading the transcript that the case was over as a practical matter. *Gillespie v. U.S. Steel Corporation,* 379 U.S. 148 (1964). For example, if, for some reason, the assigned judge had been unable to complete the case, any successor judge could have determined what the written judgment should say. F.R.C.P. 63. There would have been no need for a new hearing to re-argue the issues in the case.

C. Notice of Appeal From Non-final Order Does Not Transfer Jurisdiction to Appellate Court. IMI argues that because the trial court was considering suggested findings of fact and conclusions of law, the policy reasons behind Rule 4(a)(4) are implicated because both the court of appeals and the trial court would be considering the same question during the gap period between announcement of the trial court's order and memorialization of the decision in a judgment. IMI's reasoning ignores the "start-time" of F.R.A.P. 4(a)(2). F.R.A.P. 4(a)(2) specifies that the premature notice of appeal is not treated as filed until after the trial court

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[10] IMI's reliance on *United States v. Hansen,* 795 F.2d 35 (7th Cir. 1986) is misplaced. The case is not even similar to this case on its facts. Clearly, in *Hansen,* when the defendants filed their notice of appeal, there was no final order which disposed of all of the issues as to all of the parties in the case. The principles announced in *Hansen* simply do not apply to this case. *Hansen* also improperly construes F.R.A.P. 4(a)(2). (See Proposition III, *infra.*)

enters judgment. Only then does the appellate court begin considering the matter. The court of appeals and the district court would therefore not be "simultaneously analyzing the same judgment." (IMI's Brief p. 21.) See, e.g., *Ruby v. Secretary of the Navy, supra; Firchau v. Diamond Nat'l Corp., supra.*

PROPOSITION III

COURT OF APPEALS READS REQUIREMENT OF "FINALITY" INTO F.R.A.P. 4(a)(2)

A. F.R.A.P. 4(a)(2) Does Not Require Final Decision. The court of appeals dismissed FirsTier's appeal because it found that the trial court's announcement "was not a final decision within the meaning of 28 U.S.C. §1291." (App. to Pet. for Cert. p. A-2.) The court did not tell us why it thought the decision was not final. The parties in our case believed the trial court's decision was final when it was announced. However, even if the oral order was not a final decision, F.R.A.P. 4(a)(2) should have saved FirsTier's appeal. The court of appeals' decision would read an additional unsupported limitation into F.R.A.P. 4(a)(2): that the announcement of the decision or order must be the announcement of a complete ***final judgment*** not subject to further review or revision. Such a requirement is inconsistent with the Advisory Committee Notes and with the plain language of F.R.A.P. 4(a)(2).

Such a requirement would also turn appellate practice on its head. Pursuant to F.R.C.P. 59(d), not later than ten (10) days after ***entry*** of a judgment, the trial court may, on its own initiative, order a new trial. The parties may file

post-decision motions to revise the judgment during that same period of time. Utilizing IMI's reasoning, the time limit for filing a notice of appeal would not begin to run until the eleventh day after judgment is entered.

The approach taken by the Tenth Circuit Court of Appeals does not follow the basic principles embodied in the federal appellate rules. The adoption of the F.R.A.P. 4(a)(6) requirement for a specific final written order by the district court was designed to avoid problems in determining the appropriate time to file an appeal. When adopted, F.R.A.P. 4(a)(6) could have established a bright line rule with no exceptions. However, this was not the intent of the 1979 rule revision. See, *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). F.R.A.P. 4(a)(6) was adopted to ***reduce confusion*** in determining when a party's right to appeal began. However, to accommodate already recognized exceptions for premature appeals, the Advisory Committee also adopted F.R.A.P. 4(a)(2) to ***save*** such appeals. The approach adopted by the Tenth Circuit Court of Appeals does not provide F.R.A.P. 4(a)(2) the necessary scope needed to give effect to the very reason for its creation – the validation of an appeal noticed after announcement of a non-final decision which is subsequently entered as ***a part of the district court's final judgment.***

B. Majority Approach Does Not Require Announcement of Final Judgment. Following the spirit of the Advisory Committee's expressed view, the large majority of circuits have held that any appeal noticed after a decision is announced, even though such decision was techni-

cally not final, is effective under F.R.A.P. 4(a)(2) when (i) that decision is subsequently validated by incorporation in a final judgment entered under F.R.C.P. 54(b) or 58 and (ii) no post-judgment motions under F.R.C.P. 50, 52, or 59 are filed. *Leonhard v. United States,* 633 F.2d 599 (2d Cir. 1980), *cert. den.,* 451 U.S. 908 (1981); *Dowling v. Philadelphia,* 855 F.2d 136 (3d Cir. 1988); *Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc.,* 876 F.2d 353 (4th Cir. 1989); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160, 1165-1166 (5th Cir. 1984); *Aguirre v. S.S. Sohio Intrepid,* 801 F.2d 1185 (9th Cir. 1986); *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641 (10th Cir. 1988); *Tidler v. Eli Lilly and Co., Inc.,* 824 F.2d 84 (D.C. Cir. 1987). The majority view treats appeals noticed after (1) the announcement of a non-final decision of liability (*Federal Sav. & Loan Ins. Corp., supra*), (2) a non-final decision on fewer than all the claims in the litigation (*Aguirre, supra; Dowling, supra*) or (3) a non-final adjudication of the rights of fewer than all parties (*Leonhard, supra*) as effective upon the entry of a final judgment.

FirsTier satisfied the requirement, announced by the Second, Third, Fourth and Ninth circuits, that a premature appeal should be effective in the absence of prejudice to the opposing party. *Leonhard v. United States, supra; Dowling v. Philadelphia, supra; Federal Sav. & Loan Ins. Corp. v. Quality Inns, Inc., supra; Aguirre v. S.S. Sohio Intrepid, supra.* In this case, IMI has failed to show or even claim that any prejudice would result from giving effect to the premature appeal.

The Tenth Circuit Court of Appeals ignored the well-recognized principle announced by this Court that restrictive construction of appellate notice requirements is totally improper. *Foman v. Davis,* 371 U.S. 178 (1962).[11] F.R.A.P. 4 should not be construed to eliminate the right to appeal, but rather to save it. *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). FirsTier satisfied all requirements stated in the plain language of F.R.A.P. 4(a)(2). FirsTier's Notice of Appeal from the trial court's announced decision is the precise type of notice which F.R.A.P. 4(a)(2) was intended to save. *Matter of Grand Jury, supra; Hodge v. Hodge, supra.*

C. Circuit Court Decision Follows Minority Approach. Without so stating, the Tenth Circuit Court of Appeals has adopted the minority position set forth in *United States v. Hansen,* 795 F.2d 35 (7th Cir. 1986) and *General Television Arts, Inc. v. Southern Ry. Co.,* 725 F.2d 1327 (11th Cir. 1984).[12] The minority position takes the restric-

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[11] Citing *Torres v. Oakland Scavenger Co.,* 108 S.Ct. 2405 (1988), IMI says that this Court's decision in *Foman v. Davis* "did not involve a jurisdictional issue." (IMI's Brief p. 14.) In *Torres,* this Court said, at p. 2408, that "*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature." In the next sentence of the opinion, this Court reaffirmed "the important principle for which *Foman* stands – that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." This Court affirmed dismissal of the appeal in *Torres* because the notice of appeal did not give notice of the individual or entity seeking to appeal. *Id.* p. 2409. *Torres* does not apply to this case. IMI knew that FirsTier sought to appeal from the trial court's grant of IMI's Motion for Summary Judgment. The principles announced in *Foman* support FirsTier.

[12] The Tenth Circuit Court of Appeals' decision in our case is also inconsistent with its own forgiving attitude toward premature appeals. *Lewis v. B.F. Goodrich Co.,* 850 F.2d 641, 645 (10th Cir. 1988).

tive view that F.R.A.P. 4(a)(2) applies only to the announcement of a completely *final judgment* which is subsequently entered *without change or addition.*[13]

The minority rationale set forth in *Hansen* and *General Television* is an improper construction of F.R.A.P. 4(a)(2). This improper construction, in essence, renders that provision useless. These decisions are contrary to the historical basis upon which F.R.A.P. 4(a)(2) was incorporated in the appellate rules. In both *Hansen* and *General Television,* a non-final decision was announced which subsequently became final through entry of a final judgment under F.R.C.P. 58. The notice of appeal in each case was filed after the announcement of a decision upon which an appeal was sought. Under F.R.A.P. 4(a)(2), such notice should have been effective to appeal the decision in question. However, because of its strained interpretation of F.R.A.P. 4(a)(2), the minority holds such appeals to be without effect.

Citing the *Hansen* case, IMI asks this Court to adopt a strained interpretation of F.R.A.P. 4(a)(2). The *Hansen* case, in effect, rewrote the phrase "announcement of a decision" to read "announcement of a final judgment." In reaching its result, the *Hansen* court had to distinguish its own prior decisions construing F.R.C.P. 54(b). See, e.g., *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 760 F.2d 177

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[13] The Seventh Circuit in *Hansen* states its view to be the "majority" position. FirsTier has counted the circuits and disagrees that *Hansen* follows the majority approach, but sometimes it is difficult to place a decision in one camp or the other.

(7th Cir. 1985). IMI quoted the *Hansen* distinction on p. 25 of its brief: "The notice of appeal in such a case is timely; all that is missing is a finding necessary to make the order appealed from appealable." *Hansen,* p. 38. But if the order is "appealable" then there is no need for Rule 4(a)(2). The *Hansen* distinction is also inconsistent with F.R.C.P. 54(b) and with IMI's own reasoning on the issue of finality. Pursuant to F.R.C.P. 54(b), an order which disposes of fewer than all claims as to fewer than all parties is always subject to revision until the court has either issued a Rule 54(b) certification or entered a final judgment. The strained interpretation of F.R.A.P. 4(a)(2), which rewrites "announcement of a decision" to read "announcement of a final judgment" emasculates the rule, even in a Rule 54(b) context. If the decision announced must be final in the sense that it is no longer subject to revision, as IMI suggests, then we could never have an announcement of a decision or order until the trial court has either issued a Rule 54(b) certification or entered judgment. IMI's reasoning and the reasoning of the *Hansen* court ignores the distinction contained in F.R.A.P. 4(a)(2) between "announcement of a decision or order" and "entry of the judgment or order."[14]

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[14] IMI's reasoning would also render F.R.A.P. 4(a)(4) useless. F.R.A.P. 4(a)(4) describes the kinds of post-decisional motions that, if filed, will nullify a previously filed notice of appeal. Utilizing IMI's reasoning, however, *any* notice of appeal filed during the time when *any* post-decision motion *may* be filed would be a nullity, because any decision is always subject to revision during that time. IMI's reasoning would render the description of F.R.A.P. 4(a)(4) tolling motions useless and ineffective.

CONCLUSION

The trial court's decision as announced from the bench was final in the sense that the trial court's order completely disposed of all of the issues as to all of the parties. One could read the transcript of the proceedings and determine that the case was over when the trial court granted IMI's Motion for Summary Judgment. The policies were cancelled as of the date of the court's order. Even if the decision were not "final," F.R.A.P. 4(a)(2) saves FirsTier's appeal. Nothing in F.R.A.P. 4(a)(2) requires that a notice of appeal must be filed after announcement of a ***final*** decision or order. The decision of the Tenth Circuit Court of Appeals should be reversed.

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